TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 12

JIM SKIDMORE, ET AL., PETITIONERS,

vs.

SWIFT AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1943

CERTIORARI GRANTED MAY 29, 1944

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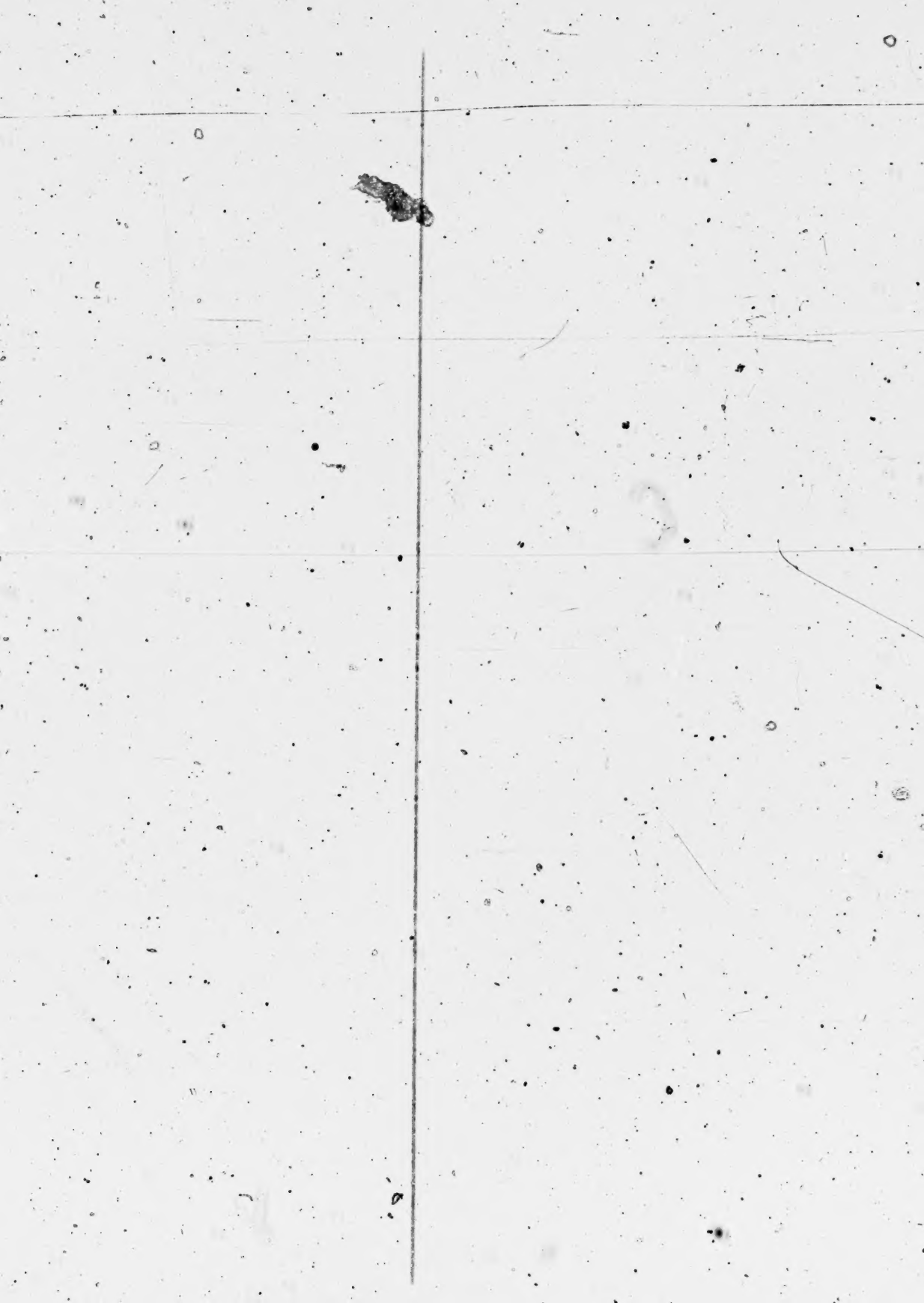

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CAPTION.

BE IT REMEMBERED that at a term of the District Court of the United States for the Northern District of Texas, begun and holden at Fort Worth, Texas, on the 9th day of March, A. D. 1942, and which term has not yet adjourned, the Honorable James C. Wilson, United States District Judge, presiding, the following cause came on for hearing and was heard, to-wit:

JIM SKIDMORE, ET AL.,

Plaintiffs,

versus

SWIFT AND COMPANY,

Defendant.

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ORIGINAL COMPLAINT.

Filed March 28, 1941.

(Title Omitted.)

I.

Plaintiff, who is a citizen of the State of Texas, residing at Fort Worth, Tarrant County, Texas, and within said Judicial District, brings this action to recover from defendant unpaid overtime compensation in the amount of $4,600.60, and an additional equal amount of liquidated damages, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and for reasonable attorney's fees

provided by said Act, (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

II.

Jurisdiction is conferred on the Court by Section 41 (8), 28 U. S. C. A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," and by Section 16 (b) of the Act.

III.

Defendant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and owns and operates a general packing-house industry in Fort Worth, Tarrant County, Texas, where plaintiff was at all times hereinafter alleged, employed by it, under and by virtue of a legal and valid franchise and of permit granted to it by the State of Texas, and that J. H. Hall is its duly authorized agent, also its General Manager of said Fort Worth Plant, upon whom citation may be served.

IV.

Defendant was at all times herein mentioned, engaged in the general packing-house business, purchasing cattle, sheep, goats, hogs, turkeys, chickens and guineas, milk, butter, eggs, feed-stuff, wheat, oats, flour, corn, also various kinds of vegetables, and various and many other such products and commodities for the purpose of manufacturing, curing, processing and converting into the finished product, and which the defendant has at all times, and still continues, to purchase, manufacture, cure, process and convert into by-products for the purpose of sale to the public generally; and especially has

the defendant during all such period of time, manufactured, processed and reprocessed, and prepared for sale and distribution, each and all of said products and by-products so manufactured and prepared by the defendant, for the purpose of selling the same to purchasers out of the State of Texas, and was at the time of the employment of the plaintiff, and still is, engaged in interstate commerce.

V.

Plaintiff further alleges that a great majority of the said goods, wares and merchandise so manufactured and processed by the defendant, as aforesaid, during the times hereinafter mentioned, were manufactured and processed and produced for interstate commerce, and that a portion greatly in excess of 50% thereof, has been sold, offered for transportation, transported, shipped and delivered to various consignees and purchasers in interstate commerce from the defendant's Plant at Fort Worth, Texas, where the plaintiff was employed, and were disposed of through purchasers at points outside of the State of Texas, for distribution and sale. The exact points to where said products were shipped, and the exact amount thereof, are not all known to plaintiff, but are well known to the defendant, its agents, servants, managers and operatives; and plaintiff here now serves notice upon the defendant to produce into Court all records within its possession which show, or tend to show all the transactions hereinabove referred to, including the amount of such products they have received, manufactured, processed and sold at and from said Fort Worth Plant; also to whom sold, when and how they were manufactured, processed and sold, and where the purchasers, and all other recipients thereof, were transacting business at the time they were sold, also the points of destination and names of all consignees of all such goods shipped by defendant from said Fort

Worth Plant, on or before three days before this cause of action is set for the first trial thereof, for the benefit of the plaintiff as evidence, otherwise secondary evidence will be introduced by the plaintiff to establish such facts.

VI.

Plaintiff further alleges that during the work-weeks beginning October 24th, 1938, and ending at the time plaintiff left the service of the defendant, which was on August 16th, 1940, defendant had in its employ, in said Fort Worth Plant, approximately 1,400 employees including men and women, in the manufacture, production and processing of such goods, wares and merchandise, above alleged, for interstate commerce.

VII.

Plaintiff further alleges that during the entire time he was so employed by the defendant, he was required by the defendant to be, and actually was, on duty and subject to call, greatly in excess of the maximum hours permitted by said Act, as hereinafter alleged, and is therefore entitled to compensation as provided by said Act, viz: (a) That it was the duty of the plaintiff, among other things, to operate the elevators maintained by the defendant in its said Plant, and thereby convey the raw material and manufactured and processed products above mentioned, from one place of production and processing to the other in said Plant, for the purpose of storage and otherwise which was a necessary part of the manufacturing, processing and preparing of all of said products for interstate commerce; (b) That in addition to said services, the plaintiff required the defendant to remain on duty as such employee, also as a watchman, for the protection of said raw materials, manufactured and processed products aforesaid, while the same were in the custody and possession

of the defendant in its said Plant, for the purpose of preserving the same for interstate shipment to the consignees, or purchasers thereof, or otherwise; (c) That in addition thereto, plaintiff was required by the defendant to remain on duty, not only for the purposes above alleged, but for the further purpose of acting as a fireman of the defendant, which required him to be on duty continuously as hereinafter alleged, for the purpose of protecting said manufactured and processed goods against any loss or damage by reason of fire, or other similar casualties, while the same were in and upon the premises of the defendant in said Fort Worth Plant.

VIII.

And plaintiff says that by reason of the services performed by him for the defendant as hereinabove alleged, it became necessary for plaintiff to work overtime, as is provided for by said Fair Labor Standards Act of 1938, as above alleged, for which he is entitled to time and one-half for all such overtime so performed by him, by reason of the premises and under the circumstances above alleged.

IX.

Plaintiff further alleges that during the time he worked for the defendant from October 24th, 1938, the effective date of said Act, to August 16, 1940, inclusive, the date he left its service, his agreed weekly wage was the sum of $27.00 per work-week of 44 and 42 hours respectively under the Act; which was all he has received from the defendant for such services actually rendered to defendant, except two weeks' paid vacation, allowed and paid to him by defendant, also one week, (5 days) when he was unjustly suspended from the service of defendant, during said period, for all of which he gives credit to de-

fendant. And plaintiff says that defendant is indebted to him for overtime in the following amounts, to wit:

From October 24, 1938, to May 2, 1939, plaintiff's weekly wage for a 44 hour work-week was $27.00, or 61 and 4 11 cents per hour. Plaintiff actually worked and or was on duty subject to call, 102 hours per week during this 27 week period, or 58 hours in excess of the 44 hour maximum for straight time pay. Defendant therefore owes plaintiff compensation for the above overtime as follows:

58 hours per week @ time and one-half or 92¢ per hour, totaling	$53.36
27 weeks @ $53.16 per week, totaling	1,440.72
Less one weeks vacation $27.00 × $53.16, totaling	80.36
Total due for period (Oct. 24, 1938, to May 2, 1939)	$1,360.36

From May 2, 1939, to October 24, 1939, plaintiff's weekly wage for a 44 hour work-week was $27.00, or 61 and 4 11 cents per hour. Plaintiff actually work and or was on duty subject to call 95 and 1 2 hours per week for this 25 week period, or 51 and ½ hours in excess of the 44 hour maximum straight time work-week. Defendant is therefore due plaintiff compensation for the above period as follows:

51½ hours per week at 92¢ per hour, totaling	$47.38
25 weeks @ $37.38 per week, totaling	$1,184.50
Less one week (laid off) 7-22 to 7-29, 1939, totaling	74.38
Total for said period (May 2, 1939, to Oct. 24, 1939)	$1,110.12

From October 24, 1939, to August 16, 1940, plaintiff's weekly wage for a 42 hour work-week was $27.00 or 64¢ per hour. Plaintiff actually worked and or was on duty subject to call 95½ hours per week during this 43 hour week period, or 53½ hours in excess of the 42 maximum for straight-time pay. Defendant therefore owes plaintiff compensation for the above overtime as follows:

53½ hours per week @ time and one-half, or 96¢ per hour, totaling	$51.36	
43 weeks @ $51.36 per week, totaling		2,208.48
Less one weeks vacation, $27.00 × $51.36, totaling		78.36
Total due for said period (Oct. 24, 1939, to Aug. 16, 1940)		$2,130.12

Recapitulation.

Oct. 24, 1938 to May 2, 1939	$1,360.36
May 2, 1939 to Oct. 24, 1939	1,110.12
Oct. 24, 1939 to Aug. 16, 1940	2,130.12
Grand total for the period from Oct. 24, 1938 to Aug. 16, 1940	$4,600.60

Wherefore, premises considered, plaintiff prays for citation to issue to the defendant as provided by law, and that upon a final hearing hereof, he have judgment against the defendant for his debt and damages in the sum of $4,600.60, plus an additional amount of liquidated damages of $4,600.60, for reasonable attorney's fees, as is provided by said Act; and for such legal interest, as to which he may be entitled; for all costs of suit herein incurred, and for all such other and further relief, general and special, at law and or in equity, to which plaintiff may show himself

entitled upon a trial hereof, and for which he will ever pray.

TOMMY FORBIS and DEE ESTES,
Attorneys for Plaintiff.
By TOMMY FORBIS.

909 Burkburnett Bldg.,
Fort Worth.

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER.

Filed May 5, 1941.

(Title Omitted.)

Now comes Swift and Company, defendant in the above entitled and numbered cause, and leave of the Court having been first sought and obtained, files this its First Amended Original Answer to plaintiff's Complaint, and would respectfully show the Court as follows:

1.

Defendant admits the allegations of paragraph I of the Complaint concerning the alleged purpose for which suit is brought, but denies the existence of the alleged unpaid overtime compensation and the asserted right to recover liquidated damages and attorney's fees.

2.

Defendant admits the allegations of paragraphs 2, 3, 4, 5 and 6 of the Complaint, with the exception of those in paragraph IV to the effect that defendant was engaged in purchasing turkeys, chickens and guineas, milk, butter,

eggs, feed stuff, wheat, oats, flour, corn and various kinds of vegetables, and various and many other such products and commodities, for the purpose of manufacturing, curing, processing and converting same into the finished product, etc., which it denies.

3.

As to paragraph VII of the Complaint, defendant denies the allegations thereof, down to that part designated as sub-paragraph (a); it admits the allegations of sub-paragraph (a); it denies the allegations of sub-paragraph (b); it denies the allegations of sub-paragraph (c), but admits that plaintiff was required to remain at the fire hall on defendant's premises, subject to call in the event of an emergency, such as fire, flood or other casualty, during certain periods of time hereinafter more fully set forth; however, it denies that plaintiff was required to be on duty continously, as alleged.

4.

Defendant denies the allegations of paragraph VIII of the Complaint.

5.

As to paragraph IX of the Complaint, defendant admits that during the time plaintiff worked for defendant from October 24, 1938 to August 16, 1940, inclusive, his agreed weekly cash wage was the sum of $27.00 per work-week, but denies that said agreed weekly wage was for a work-week of a regular or certain number of hours, determined either by agreement or custom, and further denies that said agreed weekly wage was the entire compensation which plaintiff received from defendant for services rendered, as alleged in the Complaint, which admission and

denial includes the first sentence of paragraph IX of the Complaint.

As to the allegations commencing with the second sentence of paragraph IX of the Complaint, defendant admits the arithmetical correctness of the calculations set forth therein, but denies the remainder of the allegations down to and inclusive of the prayer, and denies that if plaintiff is entitled to recover anything from defendant, that the method of computation or calculation employed by the plaintiff is the correct method of computation or calculation, to use.

In order to clarify the admission and denial contained in the foregoing paragraph, defendant denies that plaintiff actually worked and or was on duty subject to call for the number of hours per week during the three periods of time set forth in paragraph IX of the Complaint, but admits that plaintiff lived at the fire hall on defendant's premises, subject to call in the event of an emergency, such as fire, flood or other casualty, during certain periods of time, and under the circumstances hereinafter more fully set forth, and admits that, during the three periods of time set forth in said paragraph IX of the Complaint, plaintiff did stay on the premises of defendant approximately the number of hours per week alleged, in addition to the time spent working as an elevator operator.

6.

Defendant alleges that for a long time prior to October 24, 1938, and continuously since then, it maintained a fire hall on its premises, in charge of a foreman, an assistant foreman, and a sprinkler man, exclusively on fire duty, and in addition to these three men, it permitted five other workmen employed elsewhere in its plant as elevator operators, of whom plaintiff was one, to live in the fire

hall on defendant's premises during the hours they were off from duty as elevator operators, which duty as elevator operators occupied their time from 7:00 A. M., to 3:30 P. M., under oral agreements that they would be required to stay in, or close by, the fire hall; subject to call at any time in the event of an emergency, such as fire, flood or other casualty, with the exception that they were allowed one hour each morning, two hours each night, and two days and 2½ nights each week, and such other reasonable amount of time as they might desire, for meals, relaxation and entirely private pursuits, being free to come and go as they pleased, and not subject to call during these periods of time; that during the time they were required to be in or close by the fire hall, they were not required to perform any work, and had no duties whatever, except in emergencies, as aforesaid; that during such emergencies, they were paid for the time they were employed at a lawful rate.

The elevator operators who also served in the Fire Department, as aforesaid, were paid $27.00 per week, and were furnished lodging of the reasonable value of $5.00 per week, laundry of the reasonable value of 75c per week, and clothes, consisting of uniforms, of the reasonable value of $109.30.

That the Fire Hall building is equipped with suitable sleeping quarters, steam-heated and air-conditioned rooms, pool table, domino table and radio, for the convenience and recreation of the firemen, only bachelors are allowed to serve, and because of the advantages hereinbefore recited, service in the fire hall is much sought after by the defendant's employees; that plaintiff, sometime during the early part of the year 1937, voluntarily requested defendant that he be permitted to serve in its Fire Department, and on or about March 18, 1937, was assigned thereto on the terms and conditions above stated, and continuously

thereafter, until he voluntarily resigned, on or about August 16, 1940, and during the period of time involved herein, to-wit, from October 24, 1938 to August 16, 1940, a period of 95 weeks, he was furnished lodging of the reasonable value of $5.00 per week, laundry service of the reasonable value of 75c per week; and furnished certain clothes, consisting of a uniform, overcoat, various shirts and pants, all of the total value of $109.30, which he converted to his own use and benefit when he resigned, and has refused to return them to defendant, although demand has been made therefor.

That during the entire period of time involved herein, from October 24, 1938, to August 16, 1940, plaintiff, while serving as a fireman under the above described terms, conditions and circumstances, was required to answer only ten alarms, none of which required as much as an hour's time, and most of which required only about fifteen minutes time, but for all of which plaintiff was paid at a lawful rate; that during the entire period of time involved herein, plaintiff had no work or duties to perform as a fireman, except in answering the ten alarms, as above stated, and at all times had a normal night's sleep, ample time in which to eat meals, and ample time for relaxation and entirely private pursuits, being free to come and go, as he pleased, during the times above stated.

7.

Defendant says that all that part of plaintiff's cause of action, if any he had, accruing more than two years before the commencement of this suit, is barred by the statute of limitations of the State of Texas applicable thereto, being Revised Statutes 1925, Article 5528.

8.

Defendant says that in any event, under Section 7 (c) of said Fair Labor Standards Act of 1938, in the case of an employer engaged in handling, slaughtering or dressing, poultry or livestock, the provisions of Section 7 (a) of said Act, during a period or periods of not more than 14 work-weeks in the aggregate in any calendar year, do not apply to such an employer's employees in any place of employment where the employer is so engaged, and that during the entire period in question, plaintiff was employed during each work-week in a place of employment where the defendant was engaged in handling, slaughtering, or dressing poultry or live stock. Wherefore, the plaintiff's claim as asserted is to that extent excessive and proper credit should be allowed accordingly.

9.

Defendant denies that plaintiff was employed during any work-week involved herein for a number of hours greater than the number of hours spent acting as an elevator operator, and in answering fire alarms, as set forth in paragraph Six (6) of this answer, and defendant says that it has heretofore paid plaintiff for all of such work at a lawful rate, wherefore, plaintiff is not entitled to recover anything of defendant herein, but should the Court find that plaintiff was employed for work-weeks in excess of the number of hours spent acting as an elevator operator or answering fire alarms, as aforesaid, then the rate of pay at which plaintiff should be compensated for hours worked in excess of the statutory maximum set forth in Section 7 (a) of the Fair Labor Standards Act for which he has not already been compensated, must be determined by adding to his $27.00 weekly wage the sum of $5.00 per week, being the reasonable value of lodging,

and 75c per week, being the reasonable value of laundry service furnished, as aforesaid, and dividing the sum thereof by the number of hours which the Court may find plaintiff worked during the particular work-weeks in question.

10.

Wherefore, having answered herein, defendant prays that plaintiff take nothing by reason of this suit, and that defendant go hence without day and recover its costs; and, in the alternative that plaintiff's claim be held excessive, and credits granted as prayed for hereinabove; and for such other and further relief, general and special, to which defendants may be justly entitled.

THOMPSON & BARWISE,
Attorneys for Defendant,
Swift and Company.
By B. V. THOMPSON,
Of Counse.

Office Address:
800 Fort Worth Club Building,
Fort Worth, Texas.

INTERVENTION OF W. W. ROUSEY, ET AL.

14 Filed June 20, 1941.

(Title Omitted.)

To the Honorable Judge of said Court:

I.

Come now W. W. Rousey, E. Phennell, H. Millican, R. Roark, Tom Dennis and Ted Hayes, who are citizens of

the State of Texas, residing at Fort Worth, Tarrant County, Texas, and within said Judicial District, and leave of the Court having been first sought and obtained to intervene and or to be made parties plaintiff herein, seek to recover from the defendant unpaid overtime compensation in the several sums and amounts hereinafter set out, and an additional equal amount of liquidated damages, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and for reasonable attorney fees provided by said Act, (Pub. No. 718, 75th. Cong.; 52 Stat. 1060) hereinafter referred to as the Act, and plead respectively as follows:

II.

For the sake of brevity, these plaintiffs (interveners) adopt as their own, all the material allegations set forth in the plaintiff Skidmore's petition, or complaint, filed herein, insofar as same applies to these interveners (plaintiffs), especially paragraphs II to V, inclusive, also paragraphs VII and VIII thereof, as fully and to all intents and purposes as though herein set out in full.

III.

These plaintiffs (interveners) further allege that during the time they and each of them worked for the defendant from October 24th, 1938, the effective date of said Act, to and including Saturday, April 19th, 1941, inclusive, their hourly and weekly wage, also overtime compensation, were fixed solely by the defendant, and was the sum of $27.00 per work-week of 44, 42, and 40 hours respectively, and is all they have each received from the defendant up to the date of the filing hereof, for such services actually rendered to the defendant during said period, and that they are still in the service of the defendant in said capacities and performing the same hours of service, and these plaintiffs say that defendant is indebted to them, and

each of them, for overtime compensation provided by said Act, as is set forth in the following schedules, viz:

Claim of W. W. Rousey.

(Paid Vacations Deducted.).

Oct. 24, 1938, to May 2, 1939—24 weeks:

Worked 102 hours per week.

44 hours @ .6136 per hr.	27.00	
58 hours @ time and one-half, 92c per hour	53.36	
24 weeks @ 53.36 per week		$1,280.64

May 2, 1939, to Oct. 24, 1939—24 weeks:

Worked 95.5 hours per week.

44 hours @ .6136 per hr.	27.00	
51.5 hrs. @ time and one-half, 92c per hr.	47.38	
24 weeks @ 47.38 per week		1,137.12

Oct. 24, 1939, to Oct. 24, 1940—50 weeks:

Worked 95.5 hours per week.

42 hrs. @ .64 per hr.	27.00	
53.5 hrs. @ time one-half, 96c per hr.	51.36	
50 weeks @ 51.36 per week		2,568.00

Oct. 24, 1940, to April 19, 1941—23 weeks:

Worked 95.5 hours per week.

40 hrs. @ .675 per hr.	27.00	
55.5 hrs. @ time and one-half, $1.01 per hr.	56.05	
23 weeks @ 56.05 per week		1,289.15
Total Overtime Due Said Rousey to April 19, 1941		$6,274.91
Plus Liquidated Damages		6,274.91
Total		$12,549.82

Claim of E. Phenell.

(Paid Vacations Deducted.)

Jan. 3, 1939, to May 2, 1939—17 weeks:
Worked 102 hours per week.
44 hrs. @ .6136 per hr. $27.00
58 hrs. @ time and one-half, 92c per hr. 53.36
17 weeks @ 53.36 per week ..... $ 907.12

May 2, 1939, to Oct. 24, 1939—21 weeks:
Worked 95.5 hours per week.
44 hrs. @ .6136 per hr. 27.00
51.5 hrs. @ time and one-half, 92c per hr. 47.38
21 weeks @ 47.38 per week 994.98

Oct. 24, 1939, to Oct. 24, 1940—50 weeks:
Worked 95.5 hours per week.
42 hrs. @ .64 per hr. 27.00
53.5 hrs. @ time and one-half, 96c per hr. 51.36
50 weeks @ 51.36 per week 2,568.00

Oct. 24, 1940, to April 19, 1941—19 weeks:
Worked 95.5 hours per week.
40 hrs. @ .675 per hr. 27.00
55.5 hrs. @ time and one-half, $1.01 per hr. 56.05
19 weeks @ 56.05 per week 1,064.95

Total Overtime Due said Phenell to April 19, 1941 ..... $5,535.05
Plus Liquidated Damages 5,535.05

Total $11,070.10

Claim of H. Millican.

(Paid Vacations Deducted.)

Oct. 24, 1938, to May 2, 1939—26 weeks:
Worked 102 hours per week.
44 hrs. @ .6477 per hr. 28.50
58 hrs. @ time and one-half, 97c per hr. 56.26
25 weeks @ 56.26 per week 1,406.50

May 2, 1939, to Oct. 24, 1939—24 weeks:
Worked 95.5 hrs. per week.
44 hrs. @ .6477 per hr. 28.50
51.5 hrs. @ time and one-half, 97c per hr. 49.95
24 weeks @ 49.95 per week $1,198.80

Oct. 24, 1939, to Oct. 24, 1940—50 weeks:
Worked 95.5 hrs. per week.
42 hrs. @ .6785 per hr. 28.50
53.5 hrs. @ time and one-half, $1.02 per hr. 54.57
50 weeks @ 54.57 per week 2,728.50

Oct. 24, 1940, to April 19, 1941—23 weeks:
Worked 95.5 hrs. per week.
40 hrs. @ .7125 per hr. 28.50
55.5 hrs. @ time and one-half, $1.07 per hr. 59.38
23 weeks @ 59.38 per week 1,365.74

Total Overtime Due Said Millican to April 19, 1941 ..... $6,699.54
Plus Liquidated Damages 6,699.54

Total $13,399.08

Claim of R. Roark.

(Paid Vacations Deducted.)

Oct. 24, 1938, to May 2, 1939—25 weeks:
Worked 102 hrs. per week.
44 hours @ .6136 per hr. 27.00
58 hrs. @ time and one-half, 92c per hr. 53.36
25 weeks @ 53.36 per week $1,334.00

May 2, 1939, to Oct. 24, 1939—25 weeks:
Worked 95.5 hrs. per week.
44 hrs. @ .6136 per hr. 27.00
51.5 hrs. @ time and one-half, 92c per hr. 47.38
25 weeks @ 47.38 per week 1,184.50

Oct. 24, 1939, to Oct. 24, 1940—50 weeks:
Worked 95.5 hrs. per week.
42 hrs. @ .64 per hr. 27.00
53.5 hrs. @ time one-half, 96c per hr. 51.36
50 weeks @ 51.36 per week 2,568.00

Oct. 24, 1940, to April 19, 1941—22 weeks:
Worked 95.5 hrs. per week.
40 hrs. @ .675 per hr. 27.00
55.5 hrs. @ time and one-half, $1.01 per hr. 56.05
22 weeks @ 56.05 per week 1,233.10

Total Overtime Due Said Roark to April 19, 1941 $6,319.60
Plus Liquidated Damages 6,319.60

Total $12,639.20

Claim of Tom Dennis.

(Paid Vacations Deducted.)

Oct. 24, 1938, to May 2, 1939—24 weeks:
Worked 102 hrs. per week.
44 hrs. @ .6136 per hr. 27.00
58 hrs. @ time and one-half, 92c per hr. 53.36
24 weeks @ 53.36 per week $1,280.6

May 2, 1939, to Oct. 24, 1939—23 weeks:
Worked 95.5 hrs. per week.
44 hrs. @ .6136 per hr. 27.00
51.5 hrs. @ time and one-half, 92c per hr. 47.38
23 weeks @ 47.38 per week 1,089.7

Oct. 24, 1939, to Oct. 24, 1940—49 weeks:
Worked 95.5 hrs. per week.
42 hrs. @ .64 per hr. 27.00
53.5 hrs. @ time one-half, 96c per hr. .. 51.36
49 weeks @ 51.36 per week 2,516.6

Oct. 24, 1940, to April 19, 1941—23 weeks:
Worked 95.5 hrs. per week.
40 hrs. @ .675 per hr. 27.00
55.5 hrs. @ time and one-half, $1.01 per hr. 56.05
23 weeks @ 56.05 per week ..... 1,289.

Total Overtime Due Said Dennis to April 19, 1941 ..... $6,176.
Plus Liquidated Damages ..... 6,176.

Total $12,352

Claim of Ted Hayes.

(Paid Vacations Deducted.)

March 7, 1939, to May 2, 1939—8 weeks:

Worked 102 hrs. per week.		
44 hrs. @ .6136 per hr.	27.00	
58 hrs. @ time and one-half, 92¢ per hr.	53.36	
8 weeks @ 53.36 per week		426.88

May 2, 1939, to Oct. 24, 1939—23 weeks:

Worked 95.5 hrs. per week.		
44 hrs. @ .6136 per hr.	27.00	
51.5 hrs. @ time and one-half, 92¢ per hr.	47.38	
23 weeks @ 47.38 per week		1,089.74

Oct. 24, 1939, to Oct. 24, 1940—50 weeks:

Worked 95.5 hrs. per week.		
42 hrs. @ .64 per hr.	27.00	
53.5 hrs. @ time and one-half, 96¢ per hr.	51.36	
50 weeks @ 51.36 per week		2,568.00

Oct. 24, 1940, to April 19, 1941—22 weeks:

Worked 95.5 hrs. per week.		
40 hrs. @ .675 per hr.	27.00	
55.5 hrs. @ time and one-half, $1.01 per hr.	56.05	
22 weeks @ 56.05 per week		1,233.10

Total Overtime Due Said Hayes to April 19, 1941	$5,317.72
Plus Liquidated Damages	5,317.72
Total	$10,635.44

IV

Said above named claimants aver that, after the fil
of the claim of the said plaintiff, Jim Skidmore, the
fendant, Swift & Company, raised and or increased
salaries of all its employees, including these interven
plaintiffs, and that, as to them, their weekly salaries we
on Monday, the 21st. day of April, 1941, increased in
amount of $2.00 per week, making their regular wee
salary for the same services theretofore performed,
sum of $29.00 per week; That notwithstanding such
crease, these plaintiffs (interveners) are still entitle
overtime compensation as is provided by said Fair La
Standards Act of 1938, in such sums and amounts as
be, by mathematical calculations, determined, and
which they each also sue herein, in addition to their o
damages above alleged.

Wherefore, these intervening plaintiffs, and each
them, pray judgment of the Court that they, and eac
them, recover of and from the defendant, Swift & C
pany, for any and all overtime compensation to which
may show themselves entitled upon a trial hereof,
cluding liquidated damages and reasonable attorneys'
provided in said Fair Labor Standards Act of 1938,
for all costs of suit, and for general and special r
provided by law in such cases, either at law or in eq

TOMMY FORBIS and
DEE ESTES,
By TOMMY FORBIS,
Attorneys for said interv
and or plaintiffs

Address: Fort Worth, Texas.

ANSWER OF DEFENDANT, SWIFT & COMPANY TO THE COMPLAINT OF W. W. ROUSEY, E. PHENNELL, R. ROARK, TED HAYES, H. MILLICAN AND TOM DENNIS, PLAINTIFF INTERVENERS.

21 Filed July 10, 1941.

(Title Omitted.)

Now Comes Swift and Company, defendant in the above entitled and numbered cause, and for answer to the Complaint of W. W. Rousey, E. Phennell, R. Roark and Ted Hayes, and for answer to the Complaint of H. Millican and Tom Dennis, plaintiff interveners herein, would respectfully show the Court as follows, to-wit:

Defendant's Answer to the Intervention of W. W. Rousey, E. Phenneli, R. Roark and Ted Hayes, as to the Above Interveners (Plaintiffs).

1.

Defendant adopts and makes a part hereof, as though fully set out herein, all the material allegations set forth in its First Amended Original Answer heretofore filed herein to plaintiff, Skidmore's Complaint heretofore filed herein, in so far as same apply to the above interveners (plaintiffs).

2.

Defendant denies the allegations of paragraph 3 of the intervention.

3.

Defendant admits that the salaries of the above intervening plaintiffs were increased $2.00 per week, on the 21st

day of April, 1941, as set forth in paragraph 4 of their intervention, but denies the remaining allegations and prayer of said interveners.

Defendant's Answer to the Intervention of H. Millican and Tom Dennis, as to the Above Interveners (Plaintiffs):

1.

Defendant adopts and makes a part hereof, as though fully set out herein, all the material allegations set forth in its First Amended Original Answer heretofore filed herein, to plaintiff Skidmore's Complaint heretofore filed herein in so far as same apply to the above interveners (plaintiffs), specifically adopting the allegations in paragraph 1 and 2 of said Answer.

2.

As to paragraph 7 of Skidmore's Complaint, if adopted by interveners, H. Millican and Tom Dennis, defendant denies all the allegations thereof but with reference to the allegations of sub-paragraph (c), it admits that interveners, H. Millican and Tom Dennis were required to remain at the Fire Hall on defendant's premises, subject to call in the event of an emergency, such as fire, flood, or other casualty, during certain periods of time set forth in paragraphs 5 and 6 of defendant's First Amended Original Answer to Skidmore's Complaint, filed herein which are hereby adopted by reference thereto; however, defendant denies that said interveners were required to be on duty continuously, as alleged, or for the purpose alleged.

3.

Defendant denies the allegations of paragraph 3 of the intervention.

4.

Defendant admits that the salaries of the above intervening plaintiffs were increased $2.00 per week, on the 21st day of April, 1941, as set forth in paragraph 4 of their intervention, but denies the remaining allegations and prayer of said interveners.

5.

Defendant denies that said interveners, H. Millican and Tom Dennis were engaged in interstate commerce, or in the production of goods for interstate commerce, and denies that the Fair Labor Standards Act of 1938 is applicable to their cause of action.

Defendant's Plea of Limitations to the Causes of Action of Interveners, W. W. Rousey, E. Phennell, R. Roark, Ted Hayes, H. Millican and Tom Dennis.

Defendant says that all those parts of the causes of action of the above named interveners, if any they have, accruing more than two years before the commencement of this suit, are barred by the statute of limitations of the State of Texas applicable thereto, being Revised Statutes 1925, Article 5528.

Wherefore, having answered herein, defendant prays that the above named interveners take nothing by reason of their suit, and that defendant go hence without day and recover its costs; and, in the alternative, that their claim be held excessive and credits granted as prayed for

in defendant's First Amended Original Answer to plaintiff Skidmore's Complaint, in so far as same are applicable to the claims asserted by these interveners, and for such other and further relief, general and special, to which defendant may be justly entitled.

THOMPSON & BARWISE,
Attorneys for Defendant,
Swift & Company.
By B. V. THOMPSON,
Of Counsel.

Office Address:
800 Fort Worth Club Bldg.,
Fort Worth, Texas.

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24 MEMORANDUM OPINION.

Filed July 23, 1942.

(Title Omitted.)

This is a case under the Fair Labor Standards Act of 1938. It is a suit for overtime, based on alleged night work. The facts are all stipulated. The defendant does a general packing business, purchasing, handling, slaughtering, dressing, processing, selling and distributing livestock in interstate commerce. The regular day time work of plaintiffs, Dennis and Millican, was in general fire hall duties for the defendant which mainly consisted of keeping the fire hall and all fire fighting equipment, including the sprinkler system, in good condition, and answering fire calls. The regular day time work of plaintiffs Skidmore, Rousey, Phennell, Hayes and Roark was running the defendant's elevators, but certain nights were required to stay in the fire hall and respond to such calls as came in. The practical effect was that plaintiffs alike

took their turn at sleeping at the fire hall certain nights out of the week, the time they were there and awake being spent pursuing whatever pleasurable pursuits, or personal duties, they cared for. At all of such times, however, they were subject to fire calls, for which they were paid per call, from the effective date of the Act up to January 1, 1940, 50 cents and thereafter at 64 cents. For their regular work they were paid weekly salaries, running from $27.00 to $29.00. The hours they were at regular work, the hours off for meals, off from regular duty, off nights at their homes, or wherever they wanted to be, the number of fire calls answered, what they were paid for them, and what each received each week, was all accurately kept and set forth in the stipulation. For their allotted time at the fire hall, they were required to be there. It was their duty as much as performing their regular work, only that, except for such emergency calls, which were few, they could spend their time, "talking, reading, bathing, dressing, shaving, sleeping, playing pool, dominoes, checkers and other games, listening to the radio".

Of course we know pursuing such pleasurable occupations or performing such personal chores, does not constitute work. But does the fact they were subject to calls, though rare, make such hours, so spent, work hours under the Act for which overtime compensation is due them? That is the initial question. I do not think so. The Administrator's ruling on this subject strikes me as right:

"In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must

start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in the situation will be accepted by the Division." (Interpretative Bulletin No. 13, Paragraph 7, 2 Labor Law Service, page 32,402, Paragraph 32,713.)

These authorities also are helpful:

Gordell vs. H. F. Wilcox Oil & Gas Company, 206 Wage and Hour Reporter of November 3, 1941; Clifton vs. London Mines & Milling Company, 4 Labor Cases Paragraph 60,699; Muldowney vs. Seaburg Elevator Company, Inc., 4 Labor Cases, 61,515.

Plaintiffs' counsel rely more upon the nightwatchmen, police, and firemen cases, such as these:

Fleming vs. Swift & Co., 4 Whr 628; Fleming vs. Rex Oil Co., 4 Whr 628, Nov. 7, Mich. U. S. Dist. Ct.; Campbell vs. Superior Decalcomaina Co., 31 F. Supp. 663, 41 Whr 628; MKT. vs. US., 231 US. 112; CR&P Ry. Co. vs. U.S., 253 US. 555; Travis vs. Ray, 4 WHR 530, 41 F. Supp. 6; Interpretive Bulletin of W&H Admr. #13, Par. 2, 4, 5, 6, 7.

Those cases do not control here. Of course it is often true that waiting time or even subject to call time should be treated as work, such as MKT. vs. US., supra, and other cases cited by plaintiffs.

This holding eliminates the necessity of passing on a number of other questions, some of them novel and interesting, among them, how the regular rate of pay of these men would have been arrived at, if I had allowed such call time as overtime.

For the reasons stated, I find for defendant. A judgment may be drawn for my signature.

JAMES C. WILSON,
United States District Judge.

July 20, 1942.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF COURT, ACCORDANCE RULE 52 F. R. C. P.

27 Filed August 13, 1942.

(Title Omitted.)

Statement, Nature of Action:

This is a civil action under the Fair Labor Standards Act of 1938, wherein plaintiffs, as employees of defendant, seek to recover alleged unpaid overtime compensation for night work, also liquidated damages and attorneys' fees provided by the Act, the total amount sued for by the seven plaintiffs being approximately $77,000.00. The period during which plaintiffs' claims accrued was from

October 24, 1938, to April 19, 1941, or two and one-half years.

Defendant denied the existence of the alleged unpaid overtime compensation and the asserted right to recover liquidated damages and attorneys' fees; it denied that the agreed weekly wage was for a work week of a regular or certain number of hours, determined either by agreement or custom; and alleged that it had heretofore paid plaintiffs for all their work at a lawful rate.

Defendant also pleaded the two-year statute of limitations, being Revised Statutes of Texas 1925, Article 5528, to all those parts of plaintiffs' causes of action occurring more than two years before the commencement of this suit.

The case came on for trial in regular order on December 9, 1941, and was submitted to the Court without a jury on an agreed statement of facts, whereupon the Court, having duly considered same and the argument of counsel thereon, and having examined the written briefs filed herein; and having taken the case under advisement, makes and files the following Findings of Fact and Conclusions of Law, fowit:

Findings of Fact.

(1) Defendant owns and operates a general packing house business in Fort Worth, Tarrant County, Texas, and was at all times referred to herein engaged in such business, including the purchase, handling, slaughtering, dressing, processing, sale and distribution of livestock in interstate commerce.

(2) Plaintiffs, Tom Dennis and H. Millican, employees of defendant, were engaged exclusively during the period

involved, in general fire hall duties which consisted of keeping in proper condition the plant fire fighting equipment such as hose, sprinkler system, extinguishers and barrels.

(3) Plaintiffs Skidmore, Rousey, Phennell, Hayes and Roark, employees of defendant, were engaged in operating elevators in the plant and acting as relief men for Dennis and Millican in general fire hall duties.

(4) All plaintiffs usually worked in the plant, at their aforesaid duties, for approximately eight hours a day during five days a week, and were required to remain in the fire hall, or within hailing distance, subject to call in the event of a fire alarm, from four to five nights per week, but had no work or duties to perform during the time they were required to remain in or within hailing distance of the fire hall, except in answering fire alarms, which were infrequent, and usually required only 15 to 30 minutes time of one or two men to answer.

(5) No actual fires occurred, and the time required for answering alarms, caused for instance by a rusty plug or leak in the sprinkler system, in which event an alarm automatically sounded, was generally about 15 to 30 minutes, occasionally as much as one hour.

Millican answered no alarms whatever. Dennis answered thirteen alarms during the period involved, of which nine required 15 to 30 minutes time, and four required 30 to 60 minutes of his time. He therefore answered an alarm once every 2 and 3 10ths months. Skidmore answered an alarm requiring 15 to 30 minutes time about every 2 and 1 2 months. Rousey answered only two alarms, and Phennell and Hayes answered only one alarm, each requiring 15 to 30 minutes of their time during the entire period of time involved. Roark answered six

alarms, each requiring about 15 to 30 minutes of his time or about one every five months.

(6) Plaintiffs were each paid a weekly salary running from $27.60 to $29.00 per week, and, in addition, they were paid for answering fire alarms the sum of fifty cents for each alarm until January 1, 1940, and thereafter sixty-four cents for each alarm.

(7) Plaintiffs occupied their time in general fire hall duties, or as elevator operators or relief men from 7:00 A. M. to 3:30 P. M., five days a week, except for a mid-day lunch period of thirty minutes each day. At other times they were required to stay in or close by the fire hall, subject to call in the event of a fire alarm, except that, in addition to the mid-day lunch period, they had one hour each morning, two hours each night, two whole days and from two to three nights each week for meals, relaxation and entirely private pursuits, being free during these times to come and go as they pleased.

The brick fire hall building maintained by defendant on its premises was equipped with sleeping quarters, steam-heated and air conditioned rooms, a pool table, domino table and radio for the convenience and recreation of plaintiffs, who had ample time for sleeping in the fire hall and occupied their time during the hours they were required to remain there in taking, reading, bathing, dressing, shaving, sleeping, playing pool, dominos, checkers and other games, and listening to the radio.

(8) None of the plaintiffs worked in general fire hall duties, consisting of keeping in proper condition the plant fire fighting equipment, etc., or as elevator operators, or as relief men, more than the maximum 44 or 42 hours provided by the Act, but after October 24, 1940, when the 40 hour work week provision of the Wage and Hour Law

became effective, there were a few occasions—about a dozen or more—during the entire period of time involved, when defendant paid, and one of the plaintiffs accepted, additional compensation for work performed as elevator operators and relief men in excess of 40 hours per week, at a rate equal to 68c per hour for each such excess hour, and on a few holidays one of the plaintiffs was paid double time.

Conclusions of Law.

(1) The time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts.

(2) Plaintiffs have been compensated at a lawful rate for all of their work in general fire hall duties, such as keeping in proper condition the plant fire-fighting equipment such as hose, sprinkler system, extinguishers and barrels, and as elevator operators and relief men.

(3) In view of the above conclusions of law, it is unnecessary to decide the other questions in the case, such as the computation of the regular rate of pay, defendant's plea of limitations, etc.

Therefore, in accordance with the foregoing Findings of Fact and Conclusions of Law, judgment will be entered herein that plaintiffs take nothing by reason of their suit against defendant, and that said defendant recover its costs.

Counsel will prepare and submit an appropriate judgment.

JAMES C. WILSON,
United States District Judge

July 30, 1942.

31 FINAL JUDGMENT.

Filed August 1, 1942.

(Title Omitted.)

On December 9, 1941, came on to be heard the above entitled and numbered cause, and plaintiffs appeared in person and by and through their attorneys of record, and defendant also appeared by and through its representatives and attorneys of record, and a trial by jury having been waived by all parties, all matters of fact as well as of law were submitted to the Court for consideration, and the Court, after having heard the pleadings, evidence and argument of counsel and having examined the written briefs filed herein and having taken the case under advisement, is of the opinion that the facts and the law are with the defendant and that plaintiffs should not recover in this cause:

It Is Therefore Ordered, Adjudged and Decreed That plaintiffs Jim Skidmore, W. W. Rouse, E. Phennell, H. Millican, R. Roark, Tom Dennis and Ted Hayes, take nothing by reason of their suit against Swift and Company, an Illinois corporation, defendant herein, and that said defendant do have and recover of and from plaintiffs, jointly and severally, its costs in this behalf expended, for all of which let execution issue. To all of which action of the Court the plaintiffs hereby give notice to appeal to the Fifth Circuit Court of Appeals of the United States.

Dated July 30, A. D. 1942.

JAMES C. WILSON,
United States District Judge.

Approved as to form:
TOMMY FORBIS,
SAMUELS, FOSTER, BROWN & McGEE,
Attorneys for plaintiffs.

32 NOTICE OF APPEAL.

Filed August 10, 1942.

In the District Court of the United States for the Northern District of Texas, Forth Worth Division.

Jim Skidmore, et al.,
vs. Civil No. 269.
Swift and Company.

To the Honorable James C. Wilson, Judge of the said Court:

Notice is hereby given that Jim Skidmore, W. W. Ramsey, E. Phennell, H. Millican, R. Roark, Tom Dennis and Ted Hays, all plaintiffs in the above styled and numbered cause, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on or about the 31st day of July, 1942.

SAMUELS-FOSTER-BROWN & McGEE,
(Samuels-Foster-Brown & McGee)
Attorneys for Plaintiffs.

1605 Fair Bldg.,
Fort Worth, Texas.

AGREED STATEMENT OF FACTS.

33 Filed October 24, 1942.

(Title Omitted.)

The Following Facts are Agreed by the Parties Executing this Instrument to be True and Correct upon the Trial of this Cause, to-wit:

1. Plaintiffs brought this action to recover from defendant alleged unpaid overtime compensation, liquidated damages and attorney's fees provided in the Fair Labor Standards Act of 1938.

2. Defendant owns and operates a general packing house business in Fort Worth, Tarrant County, Texas, and was at all times material herein engaged in such business, including the purchase, handling, slaughtering, dressing, processing, sale and distribution of livestock in Interstate Commerce.

3. Tom Dennis and H. Millican were engaged exclusively during the period covered by this case, in general fire hall duties, which consisted of checking and maintaining in proper condition the plant fire equipment, such as hose, sprinkler system, extinguishers and barrels.

In addition to the above men, defendant employed five other workmen elsewhere in its plant, namely, Skidmore, Rousey, Phennell, Hayes and Roark, whose duties consisted of operating elevators in the plant and acting as relief men for the aforesaid two men engaged in general fire hall duties.

Defendant for a long time prior to, and continuously since October 24, 1938, maintained on its premises a brick

building known as a fire hall. All of these men worked in the plant as aforesaid, and slept or otherwise spent their time at the fire hall according to the schedule of hours appearing hereinafter. Their aforesaid work usually occupied their time from 7:00 A. M. to 3:30 P. M., except for a mid-day period of 30 minutes when they were permitted time off for lunch.

These plaintiffs were employed by defendant under oral agreements whereby, in addition to their daytime work as elevator operators, or while engaged in performing general fire inspection duties, they agreed to remain in the fire hall and stay in it or within hailing distance, subject to call, in the event of fire or other casualty, but were not required to perform any specific tasks during these periods of time, except in answering alarms. For the performance of these specific tasks plaintiffs were paid for the time spent on same as set forth in the schedules hereinafter appearing.

During the entire period of time involved herein, plaintiffs had no work or duties to perform during the time they were required to remain in or within hailing distance of the fire hall, except in answering certain fire alarms, as shown in the schedules hereinafter appearing, and had ample time for sleeping.

The fire hall building was equipped with sleeping quarters, steam heated and air-conditioned rooms, a pool table, dining table and radio, for the convenience and recreation of its occupants.

Each of the plaintiffs, if permitted to testify over defendant's objections at the trial, which are hereby reserved, would say that he maintained a residence where he slept, except when he slept at the fire hall according to the schedules hereinafter appearing.

Tom Dennis, Assistant Foreman, was paid a weekly cash salary of $27.00 until May 24, 1940, and thereafter $29.00, to April 19, 1941. H. Mulhern was paid a weekly cash salary of $23.50. Skidmore, Phennell, Rousey, Hayes and Roark were each paid a weekly cash wage of $27.00 per week. In addition the men were paid for answering fire alarms as shown hereinafter.

Cases of Jim Skidmore, W. W. Rousey, E. Phennell, R. Roark and Ted Hayes.

Period Oct. 24, 1938 to May 2, 1939 (44 Hour Law in effect)

		Hours
Typical schedule of hours of plaintiffs covering each day of a 7 day week		168
Monday:		
Midnight to 6:00 A. M.	Fire Hall	6
6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.	Operate elevator or general relief	8
Mid-day lunch period	Time off	1½
3:30 P. M. to 5:30 P. M.	Supper (time off)	2
5:30 P. M. to Midnight	Fire Hall	6½
Tuesday:		
Midnight to 6:00 A. M.	Fire Hall	6
6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.	Operate elevator or general relief	8
Mid-day lunch period	Time off	1½
3:30 P. M. to 5:30 P. M.	Fire Hall	2

Wednesday:		
5:30 P. M. Tuesday to		
5:30 P. M. Wednesday	Time off	24
5:30 P. M. to Midnight	Fire Hall	6½
Thursday:		
Midnight to 6:00 A. M.	Fire Hall	6
6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.	Oil tate elevator or general relief.	8
Midday lunch period	Time off	½
3:30 P. M. to 5:30 P. M.	Supper (time off)	2
5:30 P. M. to Midnight	Fire Hall	6½
Friday:		
Midnight to 6:00 A. M.	Fire Hall	6
6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.	Oil tate elevator or general relief.	8
Midday lunch period	Time off	½
3:30 P. M. to 5:30 P. M.	Fire Hall	2
5:30 P. M. to Midnight	Time Off	6½
Saturday:		

6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1	
7:00 A. M. to 5:00 P. M.	Operate elevator or general relief	9½	
Mid-day lunch period	Time off	½	
5:00 P. M. to 5:30 P. M.	Fire Hall	½	
Sunday:			
5:30 P. M. Saturday to 5:30 P. M. Sunday	Time off	24	
5:30 P. M. to Midnight	Fire Hall	6½	
		—	168 41

Cases of Skidmore, Rousey, Phennell, Roark and Hayes; (Continued).

1. (a) The term "Fire Hall" following certain periods of hours in the above schedule, means these employees were required to be in or close by the Fire Hall during the hours specified, subject to call in the event of emergencies, such as fire alarms (the only material emergencies occurring herein), but were not required to perform any work and had no duties whatever, except in the aforesaid emergency calls. They occupied their time during these hours in talking, reading, bathing, dressing, shaving, sleeping, playing pool, dominos, checkers and other games, listening to the radio.

(b) The term "time off" following certain periods of hours in the above schedule means that during said periods these employees had no work or duties whatever to perform, nor were they required to remain in or near the fire hall, but were free to come and go as they pleased.

(c) The term "operate elevator or general relief" following certain periods of hours in the above schedule, means that during these periods these employees were engaged in operating elevators in defendant's plant, or in general relief work, such as relieving another elevator operator or inspecting and caring for plant equipment, such as hose, sprinkler system, extinguishers and barrels.

2. (a) The above schedule is typical only, and does not mean that these employees each adhered to this identical schedule—they had days off in rotation; otherwise, their schedule of hours was the same as indicated in the typical schedule.

(b) The same schedule (October 24, 1938 to May 2, 1939) applies to the periods May 2, 1939 to October 24,

1939, and October 24, 1939 to October 24, 1940, while these men were employed, except they had an additional one-half night off per week during the last two periods stated.

(c) The same schedule (October 24, 1938 to May 2, 1939) applies to the period from October 24, 1940 to April 30, 1941, while these men were employed, except they had an additional one-half night off, had 1½ hours less work as elevator operators, and stayed in the Fire Hall 1½ hours more per week, between 3:30 and 5:00 P. M.

3. (a) During the various periods for which claims are made, these men were each paid a regular weekly wage of $27.00.

(b) In addition, they were paid for answering each fire alarm, as follows:

From October 24, 1938 to Jan. 1, 1940 ..... 50 cents)
From January 1, 1940 to Oct. 24, 1940 ..... 64 cents)

(Answered no alarms thereafter.)

(c) No actual fires occurred, and the time required for answering alarms, caused for instance by a rusty plug or leak in the sprinkler system, in which event an alarm automatically sounded, was generally about 15 to 30 minutes, occasionally as much as one hour.

(d) The only docking for absence from duties as elevator operators occurred in the cases of Skidmore, Rousey, Phennell and Hayes, was on the basis of $5.40 per day until January 1, 1940, and thereafter 64 cents per hour, if the absence involved less than a full day.

4. The actual number of weeks worked by these men during the periods for which claims are made, was as follows:

Period of Claim	Skidmore	Rousey	Pfennell	Roark	Hayes
Oct. 24, 1938 to May 2, 1939	22 weeks until 3-28-39 5 weeks after 3-28-39	24 weeks	16 weeks	27 weeks	8 weeks
May 2, 1939 to Oct. 24, 1939	24 weeks	7 weeks until 6-20-39 15 weeks after 6-20-39	6 weeks until 6-20-39 18 weeks after 6-20-39	5 weeks until 6-20-39 18 weeks after 6-20-39	7 weeks until 6-20-39 16 weeks after 6-20-39
Oct. 24, 1939 to Oct. 24, 1940	41 weeks to 8-16-40 (Transferred to Car Dept.)	48 weeks	50 weeks	50 weeks	50 weeks
Oct. 24, 1940 to Apr. 19, 1941	0 weeks	23 weeks	19 weeks	25 weeks	25 weeks

5. During the periods for which claims are made, the only emergencies occurring were a number of fire alarms, which these men were required to answer during certain weeks, and during those weeks they answered said alarms and performed certain duties for certain periods of time, and were paid as follows:

	Week Ending	Time Answering Alarm	Work Operating Elevator or General Relief	Wage
Skidmore—				
	11-18-38	15 to 30 minutes	42½ hours	$27.50
	6-30-39	15 to 30 minutes	43 hours	27.50
	8- 4-39	15 to 30 minutes	41½ hours	27.50
	9-29-39	15 to 30 minutes	41½ hours	27.50
	10-27-39	15 to 30 minutes	41½ hours	27.50
	11-10-39	15 to 30 minutes	41½ hours	27.50
	1-26-40	15 to 30 minutes	41½ hours	27.64
	2- 9-40	15 to 30 minutes	41½ hours	27.64
Rousey—				
	3-10-39	15 to 30 minutes	42½ hours	27.50
	2-23-40	15 to 30 minutes	41½ hours	27.64
Phennell—				
	4-14-39	15 to 30 minutes	41½ hours	27.50
Roark—				
	11-18-38	15 to 30 minutes	41½ hours	27.50
	2-17-39	15 to 30 minutes	42½ hours	27.50
	3-10-39	15 to 30 minutes	42½ hours	27.50
	10-27-39	15 to 30 minutes	41½ hours	27.50
	2- 9-40	15 to 30 minutes	41½ hours	27.64
	10-18-40	15 to 30 minutes	42 hours	27.64
Hayes—				
	8-11-39	15 to 30 minutes	42 hours	27.50

Note: (a) The balance of the time of these men for the specific weeks indicated, was spent according to the above agreed schedule of hours.

Cases of Skidmore, Rousey, Phennell, Roark and Hayes.

Hours Worked Per Week and Method of Pay.

Period October 24, 1938, to May 2, 1939, and May 2, 1939, to October 24, 1939 (44 Hour Law in Effect):

Worked as elevator operators and general relief men—41½ Hours per week—usually	Paid in Cash $27.00 per week regardless of hours worked.
Worked as elevator operators and general relief men—42½ to 43 hours per week—rarely (In 11 separate instances one man worked 42½ to 43 hours per week.)	
Worked as elevator operators and general relief men more than 44 hours per week—never	

Period October 24, 1939, to October 24, 1940, (42 Hour Law in Effect):

Worked as elevator operators and general relief men—41½ Hours per week—usually	Paid in Cash $27.00 per week regardless of hours worked.
Worked as elevator operators and general relief men—42 Hours per week—rarely (In 46 separate instances one man worked 42 hours per week.)	
Worked as elevator operators and general relief men more than 42 hours per week—never	

Period October 24, 1940, to April 19, 1941, (40 Hour Law in Effect):

	Paid in Cash
Worked as elevator operators and general relief men—40 hours per week—usually	$27.00

Some of these men worked as elevator operators and general relief men, more than 40 hours per week, as follows:

	Week Ending	Hours	Pay
Phennell	4-4-41	41	$27.68
	1-3-41	48	37.80
Rousey	12-6-40	41	27.68
	2-14-41	41	27.68
	2-28-41	42	33.75
	12-27-40	48	37.80
	1-3-41	48	37.80
Hayes	12-6-40	41	27.68
	2-28-41	48	37.80
Roark	1-24-41	44	29.70
	12-27-40	48	37.80
	1-3-41	48	37.80
	1-31-41	48	32.40
	3-14-41	48	32.40
	3-21-41	48	32.40

Note: Double time was paid for holidays in the above schedule.

Note: The men were paid $27.00 per week in the above schedules, plus amounts paid for answering fire alarms.

Cases of H. Millican and Tom Dennis.

Period Oct. 24, 1938 to May 2, 1939 (44 Hour Law in effect)

Typical schedule of hours of plaintiffs covering each day of a 7-day week ..... Hours 163

Monday:

		Hours
Midnight to 6:00 A. M.	Fire Hall	6
6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.	General Fire Hall duties	8
Mid-day lunch period	Time off	½
3:30 P. M. to 5:30 P. M.	Supper (time off)	2
5:30 P. M. to Midnight	Fire Hall	6½

Tuesday:

Midnight to 6:00 A. M.	Fire Hall	6
6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.	General Fire Hall duties	8
Mid-day lunch period	Time off	½
3:30 P. M. to 5:30 P. M.	Fire Hall	2

Wednesday:

5:30 P. M. Tuesday to 5:30 P. M. Wednesday.	Time off	24
5:30 P. M. to Midnight	Fire Hall	6½

Thursday:

Midnight to 6:00 A. M.	Fire Hall	6
6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.	General Fire Hall duties	8
Mid-day lunch period	Time off	½
3:30 P. M. to 5:30 P. M.	Supper (time off)	2
5:30 P. M. to Midnight	Fire Hall	6½

Friday:

Midnight to 6:00 A. M.	Fire Hall	6
6:00 A. M. to 7:00 A. M.	Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.	General Fire Hall duties	8
Mid-day lunch period	Time off	½
3:30 P. M. to 5:30 P. M.	Fire Hall	2
5:30 P. M. to Midnight	Time off	6½

Saturday:		
Midnight to 6.00 A. M.	Fire Hall	6
6.00 A. M. to 7.00 A. M.	Breakfast (time off)	1
7.00 A. M. to 5.00 P. M.	General Fire Hall duties	9½
Meal-day lunch period	Time off	1
5.00 P. M. to 5.30 P. M.	Fire Hall	½
Sunday:		
5.30 P. M. Saturday to 5.30 P. M. Sunday	Time off	24
5.30 P. M. to Midnight	Fire Hall	6½
		163

50

Cases of H. Millican and Tom Dennis-Continued.

1. (a) The term "Fire Hall" following certain periods of hours in the above schedule, means these employees were required to be in or close by the Fire Hall during the hours specified, subject to call in the event of emergencies, such as fire alarms (the only material emergencies occurring herein), but were not required to perform any work and had no duties whatever, except in the aforesaid emergencies. They occupied their time during these hours in talking, reading, bathing, dressing, shaving, sleeping, playing pool, dominos, checkers and other games, listening to the radio, and for such other purposes as they desired.

(b) The term "time off" following certain periods of hours in the above schedule means that during said periods these employees had no work or duties whatever to perform, nor were they required to remain in or near the fire hall, but were free to come and go as they pleased.

(c) The term "general fire hall duties" following certain periods of hours in the above schedule means that during these periods these employees were engaged in inspecting and caring for plant equipment, such as hose, sprinkler system, extinguishers and barrels.

2. (a) The above schedule is typical only—these employees had days off in rotation; otherwise, their schedule of hours was the same as indicated in the typical schedule.

(b) The same schedule (October 24, 1938, to May 2, 1939) applies to the periods May 2, 1939 to October 24, 1939, and October 24, 1939 to October 24, 1940, while these men were employed, except they had an additional one-half night off per week during the last two periods stated.

(c) The same schedule (October 24, 1938 to May 2, 1939) applies to the period from October 24, 1940 to April 19, 1941, while these men were employed, except they had an additional one-half night off, had one and one-half hours less work on general fire hall duties, and stayed in

the Fire Hall one and one-half hours more per week, between 3:30 and 5:00 P. M.

3. (a) During the various periods for which claims are made, Tom Dennis was paid a regular weekly salary of $27.00 until May 24, 1940, and thereafter $29.00 to April 19, 1941; and H. Millican was paid a regular weekly salary of $28.50 until April, 19, 1941.

(b) In addition, Tom Dennis was paid for answering each fire alarm as follows:

From Oct. 24, 1938 to Jan. 1, 1940 ..... 50 cents)
From Jan. 1, 1940 to Apr. 12, 1940 ..... 64 cents)
(Answered no alarms thereafter.)

(c) H. Millican did not answer any fire alarms from the time he was employed until and including April 19, 1941.

4. The actual number of weeks worked by these men during the period for which claims are made, was as follows:

Period of Claim	Tom Dennis	H. Millican
Oct. 24, 1938 to May 2, 1939	24 weeks	27 weeks
May 2, 1939 to Oct. 24, 1939	7 weeks until 6-20-39 18 weeks after 6-20-39	8 weeks until 6-20-39 16 weeks after 6-20-39
Oct. 24, 1939 to Oct. 24, 1940	50 weeks	50 weeks
Oct. 24, 1940 to Apr. 19, 1941	25 weeks	23 weeks

5. During the periods for which claims are made, the only emergencies occurring were a number of fire alarms, none of which H. Millican was required to answer. Tom Dennis was required to answer these fire alarms during certain weeks, and during those weeks he answered said alarms and performed certain duties for certain periods of time, and was paid as follows:

Tom Dennis— Week Ending	Time Answering Alarm	Work Performing General Fire Hall Duties	Salary
2-17-39	15 to 30 minutes	42½ hours	$27.50
3-10-39	15 to 30 minutes	41½ hours	27.50
5-12-39	15 to 30 minutes	42½ hours	27.50
6-23-39	15 to 30 minutes	42½ hours	27.50
6-30-39	30 to 60 minutes 2 alarms	42½ hours	28.00
7-21-39	15 to 30 minutes	42½ hours	27.50
8-4-39	15 to 30 minutes	42½ hours	27.50
9-29-39	15 to 30 minutes	42½ hours	27.50
10-13-39	30 to 60 minutes 2 alarms	41½ hours	28.00
11-10-39	15 to 30 minutes	41½ hours	27.50
4-12-40	15 to 30 minutes	41½ hours	27.64

Note: (a) The balance of Tom Dennis' time for the specific weeks indicated above was spent according to the above agreed schedule of hours.

(b) No actual fires. Pay for answering alarms fifty cents (50c) for each alarm until January 1, 1940; thereafter, 64 cents for each alarm.

Cases of Millican and Dennis.

Hours Worked Per Week and Method of Pay.

Period October 24, 1938, to May 2, 1939, and May 2, 1939, to October 24, 1939, (44 Hour Law in Effect):

	Paid in Cash
Worked as firemen, exclusively—41½ hours per week—usually	Dennis: $27.00 Millican: $28.50
Worked as firemen, exclusively—42 to 43½ hours per week—rarely .. (In 5 separate instances Dennis worked 42½ to 43½ hours per week, and Millican worked 42 hours per week 8 separate instances.)	
Worked as firemen, more than 44 hours per week—never	

Period October 24, 1939, to October 24, 1940 (42 Hour Law in Effect):

	Paid in Cash
Worked as firemen, exclusively—41½ hours per week—usually	Dennis: $27.00 to 5-24-40 $29.00 thereafter
Worked as firemen, exclusively—42 hours per week—rarely ..... (In 6 separate instances Dennis worked 42 hours per week.)	Millican: $28.50
Worked as firemen more than 42 hours per week—never	

Period October 24, 1940, to April 19, 1941 (40 Hour Law in Effect):

	Paid in Cash
These men worked as firemen, exclusively 40 hours per week—usually	Dennis: $29.00 Millican: $28.50

They worked more than 40 hours per week in the following instances:

	Week Ending	Hours	Pay
Dennis	12-20-40	41	$29.00
	2-28-41	41	29.00
	1-10-41	44	29.00
	1-24-41	44	29.00
Millican	12-20-40	41	28.50
	3-28-41	41	28.50
	4-18-41	41	28.50
	1-10-41	44	28.50

Explanation:

These men were paid their regular salaries regardless of whether they worked 35, 40, 41 or 44 hours per week.

Note: In addition to $27.00 paid weekly, Tom Dennis was paid for answering fire alarms, as stated on page 13.

The parties hereto may introduce additional testimony not in conflict with, or in contradiction of, the facts herein stated.

H. MILLICAN,
TOM DENNIS,
JIM SKIDMORE,
W. W. ROUSEY,
E. PHENNELL,
R. ROARK,
TED HAYES,
Plaintiffs.

(S.) By R. CURTIS McBROOM,
TOMMY FORBIS,
Their Attorneys of Record.

SWIFT AND COMPANY,
Defendant.

(S.) By THOMPSON & BARWISE,
Its Attorneys of Record.

51 SUPPLEMENTAL AGREEMENT.

In explanation of the schedule appearing at the bottom of page nine of this agreement purporting to show certain work performed by plaintiffs Skidmore, Rousey, Phennell, Roark and Hayes as elevator operators and general relief men, totaling forty hours per week usually, and more than forty hours per week in some instances, it is agreed that subsequent to the time the oral contracts of employment were made, and on or about October 24, 1940 when the forty-hour work week provision of the wage and hour law became effective, defendant paid and plaintiffs accepted additional compensation for work performed as elevator operators and as general relief men in excess of forty hours per week, at a rate equal to 68 cents per hour for each such excess hour.

Nothing in the agreement is to be construed or argued as an agreement that any part of the wages or salaries paid plaintiffs represented pay for any particular part of their work or time spent in the fire hall, these matters being left for the determination of the Court.

It is further agreed that the amount of the attorneys fees will be left to the discretion of the Court.

We agree to the above.

(S.) R. CURTIS McBROOM.
(S.) TOMMY FORBIS.
Attorneys for Plaintiffs.
(S.) THOMPSON & BARWISE.
Attorneys for defendant.

52 BOND.

Filed October 20, 1942.

(Title Omitted.)

Know All Men By These Presents: That we, Raymond Roark, as principal, and Jack Love and Tommy Forbis, as sureties, are held and firmly bound unto the above named Swift and Company, in the sum of $250.00; to which payment, well and truly to be made, we bind ourselves jointly and severally, our heirs, executors, successors, and assigns, respectively, firmly by these presents.

Sealed with our seals and dated this 19th day of October, 1942.

Whereas, the plaintiff, Raymond Roark, has prosecuted his appeal to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment entered in said cause by the United States District Court for the Northern District of Texas, on the 1st day of August, 1942, against said plaintiff.

Now, Therefore, the condition of this obligation, is such, that if the above named plaintiff, Raymond Roark, shall prosecute his appeal to effect and answer all costs if he fails to make good his plea, then this obligation to be void, otherwise in full force and virtue.

R. ROARK,
Principal,
JACK LOVE,
Surety.
TOMMY FORBIS,
Surety.

State of Texas,
County of Tarrant.

On this 19th day of October, A. D. 1942, before me, the undersigned, a Notary Public within and for said county and state, personally appeared Raymond Roark, Jack Love and Tommy Forbis, known to me to be the persons who are described in and who executed the foregoing instrument, and they each acknowledged to me that they executed the same.

ETHEL J. MURPHY,
(Seal) Notary Public.

State of Texas,
County of Tarrant.

Jack Love and Tommy Forbis, sureties on the annexed bond, being duly sworn, depose and say that they are residents of and freeholders in said Northern District of Texas, that they are worth at least the sum of $1000.00, over and above all their just debts and liabilities, in property subject to execution and sale, and that their property consists of real estate, located at Fort Worth, Tarrant County, Texas.

TOMMY FORBIS;
Sureties.

Subscribed and sworn to before me, the undersigned, this 19th day of October, 1942.

ETHEL J. MURPHY,
(Seal) Notary Public.

ORDER GRANTING MOTION FOR EXTENSION OF TIME.

54 Filed Sept. 19, 1942.

(Title Omitted.)

Plaintiffs' motion, filed September 17, 1942, requesting extension of time for perfecting appeal in the subject case, is hereby granted. The time for filing the transcript in the Circuit Court of Appeals for the Fifth Circuit is here extended to October 5th, 1942.

Dated this 18 day of September, 1942.

JAMES C. WILSON,
Judge.

ORDER GRANTING MOTION FOR EXTENSION OF TIME.

55 Filed October 2, 1942

(Title Omitted.)

Plaintiffs' motion, filed October 2, 1942, requesting extension of time for perfecting appeal in the subject case, is hereby granted. The time for filing the transcript in the Circuit Court of Appeals for the Fifth Circuit is here extended to October 28, 1942.

Dated this 2nd day of October, 1942.

JAMES C. WILSON,
Judge.

DESIGNATION OF RECORD FOR APPEAL TO CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

56 Filed September 26, 1942.

(Title Omitted.)

Complaint, filed March 28, 1941.

First Amended Answer, filed May 5, 1941.

Intervention of W. W. Rousey, et al, filed June 20, 1941.

Defendant's Answer to Intervention, filed July 10, 1941.

Opinion, filed July 23, 1942.

Judgment, filed August 1, 1942.

Notice of Appeal, filed August 10, 1942.

Findings of Fact and Conclusions of Law, filed August 13, 1942.

Order Extending Time for Filing Record on Appeal, filed September 19, 1942.

Statement of Facts—Stipulation.

CURTIS McBROOM,
Attorney for Plaintiff.

57 CLERK'S CERTIFICATE.

I, GEO. W. PARKER, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify that the above and foregoing is a full, true and correct copy and transcript of record of all papers called for in the designation, which is a part of this transcript, in Civil Action No. 269, on the docket of aforesaid Court, wherein Jim Skidmore, et al, are appellants, and Swift and Company, is appellee, as fully as the same remain on file and of record in my office at Fort Worth, Texas.

Given under my hand and seal of office at Fort Worth, Texas, this 26th day of October, A. D. 1942.

GEO. W. PARKER,
Clerk.

(Seal)

By RIVE J. McGREW,
Deputy.

[fol. 62] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of May 18th, 1943

No. 10493

JIM SKIDMORE, ET AL.

versus

SWIFT AND COMPANY

On this day this cause was called, and, after argument by R. Curtis McBroom, Esq., for appellants, and B. V. Thompson, Esq., for appellee, was submitted to the Court.

[fol. 63] OPINION OF THE COURT — Filed June 1, 1943

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10493

JIM SKIDMORE, ET AL., Appellants,

versus

SWIFT AND COMPANY, Appellee

Appeal from the District Court of the United States for the Northern District of Texas — June 1, 1943

Before Hutcheson and Waller, Circuit Judges, and Cox, District Judge.

WALLER, Circuit Judge: Appellants sued for overtime compensation under the Fair Labor Standards Act (U. S. C., Title 29, Sec. 201, et seq.), including attorney fees and liquidated damages, totalling approximately $77,000.00. All facts were stipulated, a jury waived, and judgment ren-
[fol. 64] dered for defendant. No questions as to coverage of minimum wages were involved.

Plaintiffs were firemen or elevator operators or relief firemen, none of whom regularly worked more than the

minimum hours per week, unless time spent at the fire hall subject to call in case of an alarm is held to be "working".

Plaintiffs orally agreed that in addition to their regular eight hour duties they would remain in the fire hall, or within hailing distance thereof, three and one half to four nights each week so as to be available in the event of an alarm. On these nights they were not required to perform any tasks except to answer alarms, for which they received extra pay.

No fires occurred during the period under consideration, but there were a few occasions when a defect in the sprinkler system would automatically set off an alarm.

Plaintiff Millican never answered an alarm. Dennis answered one alarm on the average of every two and three-tenths months. Skidmore answered one on the average of each two and one-half months. Ronsey averaged one alarm in each fifteen months. Phennell and Hayes each answered only one alarm in two and one half years. Roark averaged answering one alarm every five months. The time consumed in answering an alarm was ordinarily from fifteen to thirty minutes.

Plaintiffs claim the right to be compensated in overtime wages for the entire time they were in the fire hall, available in case of an alarm.

The fire hall was equipped with steam heated, air conditioned sleeping quarters, with a pool table, domino tables and radio for the comfort, convenience, and relaxation of the [fol. 66] men. Plaintiffs could retire at their pleasure and sleep throughout the night unless one of the rare alarms sounded, in which event they responded and were paid for so doing.

These facts give rise to the inquiry whether under the Fair Labor Standards Act an employee is working when he is sleeping, playing pool, dominoes, or the radio, [illegible] because he is required to stay on the employer's premises and be available in case of an alarm.

The mere fact that a servant has agreed to live on the premises does not justify the conclusion that he is engaged in employment every moment he is there. One must sleep whether at home or abroad, nor is he at work when he is asleep. The rule of long hours of toil is not pre-empted. The employee works eight hours during the day and is free, if allowed, to play, read, or sleep on nights in the hall according to the pleasure of each.

ly plaintiffs are not entitled to recover overtime
ation for sleeping.

raph 6 of Interpretative Bulletin No. 13 expresses
that a switchboard operator in a small telephone
, who has her bed alongside the switchboard, and
ng the night is sometimes awakened by the alarm
a call comes in, but who is able to get several
uninterrupted sleep every night, as experience
eral months can demonstrate, should have her
ours segregated from the hours worked. We think
pretation is correct.

t does not require payment of wages to an em
erely because he is away from home. Nor does
undertake to regulate or restrict reasonable and
agreements whereby an employee agrees to be
available if needed. "Working" is not synony
h "availability for work".

ffs, in their proof, have failed to segregate sleep
from non sleeping, pool, domino, and radio, play
Even if the plaintiffs had been entitled to re
hours spent in boredom, or waiting for bedtime,
n, the proof wholly fails to prove the actual hours
ent in sleeping, playing pool, dominoes, or radio,
shaving, bathing, or in any of said enterprises,
n of which was on the plaintiffs.

lgment below is

Affirmed.

JUDGMENT

tract from the Minutes of June 1st, 1943

No. 10493

JIM SKIDMORE, ET AL.

versus

SWIFT AND COMPANY

se came on to be heard on the transcript of the
on the District Court of the United States for the
District of Texas, and was argued by counsel;

ded Southwest Co. vs. McBride, 124 F. 2d 90
Co. vs. Bedfern, 124 F. 2d 172.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Jim Skidmore, and others, and the sureties on the appeal bond herein, Jack Love and Tommy Forbis, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 68] Motion and Order Staying Mandate—Filed June 25, 1943

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10493

Jim Skidmore, et al., Appellants,

versus

Swift and Company, Appellee

Motion to Stay Issuance of Mandate

To the Honorable Justices of the United States Circuit Court of Appeals for the Fifth Circuit:

Your petitioners, Jim Skidmore, et al., appellants in the above styled and numbered cause, respectfully present this, their application for an order staying the execution and mandate of the decree of this Court, rendered in the above styled and numbered cause on the 21st day of June, 1943, under the provisions of Section 350 of Title 28 of the United States Code, to enable said petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States.

The grounds upon which said petition for certiorari will be based are as follows:

1. That the decision rendered in this cause is on an important federal question which has not been, but should be, settled by the Supreme Court; and

2. That the decision rendered in this cause is in conflict with the decision of this Court and another Circuit Court of Appeals in cases involving the same matter.

Therefore, in view of the nature of the writ of certiorari sought, and the end sought to be accomplished thereby, no useful purpose would be served if the mandate or other process of this Court should issue before the Supreme Court has disposed of such petition, but would rather cause unnecessary complications and delay.

[fol. 69] Wherefore, Jim Skidmore, et al., appellants, pray that the mandate of this Court be stayed and withheld during the pendency of the said petition for writ of certiorari in the Supreme Court.

A copy of this motion has been given to Beverley Thompson, Attorney for Swift and Company, Appellee.

_____, Attorney for Jim Skidmore, et al., Appellants.

[fol. 70] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 10493

JIM SKIDMORE, et al., Appellants,

versus

SWIFT AND COMPANY, Appellee

On Consideration of the Application of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that the proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is fur-

ther ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 25th day of June, 1943.

(Signed) Curtis L. Waller, United States Circuit Judge.

[fol. 71] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 72] Supreme Court of the United States

Order Allowing Certiorari—Filed May 29, 1944

The order denying certiorari is vacated and the petition for writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit is granted and the case is transferred to the summary docket. The Solicitor General is invited to file a brief amicus curiae if he is so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

TERM, 1943

NO. [redacted] 12

JIM SKIDMORE, ET AL,
Petitioner and Appellant Below

vs.

SWIFT AND COMPANY,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Fort Worth, Texas,
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SUPREME COURT OF THE UNITED STATES

TERM, 1941

NO. _____

JIM SKIDMORE, ET AL.,
Petitioners

vs.

SWIFT AND COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Jim Skidmore, et al, respectfully shows:

I.

STATEMENT OF MATTER INVOLVED

On March 28, 1941, your petitioner filed a complaint in the United States District Court for the Northern District of Texas, Fort Worth Division, against Swift and Company, and on June 20, 1941, W. W. Rousey, E. Phennell, H. Millican, R. Roark, Tom Dennis, and Ted Hayes filed as intervening plain-

tiffs. The suit was brought under the Fair Labor Standards Act of 1938, 52 Stat. 1060, also 29 U. S. C. A., Section 201, et seq, hereafter referred to as "the Act," in which petitioners sought to recover back wages alleged to be due them under the Act.

On the 9th day of December, 1941, the case was tried in the said District Court without jury, and with all facts stipulated and agreed to between the parties. (See Tr. pp. 36-56.) On August 1, 1941, judgment was rendered by the District Court in favor of the defendant, Swift and Company. Due notice was given for appeal to the United States Circuit Court of Appeals for the Fifth Circuit. It was submitted to the Court on May 19, 1943. On June 1, 1943, the Circuit Court for the Fifth Circuit rendered its judgment, affirming the finding of the District Court.

The facts in the case are completely set out in the Transcript of the Record, and there is no dispute of any question of fact involved in this case, since they were fully stipulated and agreed between the parties before trial in the District Court. (Tr. pp. 36 to 56.) Very briefly, the facts may be stated as follows:

The seven joint plaintiffs (petitioners herein) had for a number of years been employed by Swift and Company (respondent herein) in its meat-packing plant located in Fort Worth, Texas. The question of interstate commerce was admitted by the defendant in its answer; the applicability of the two year Statute of Limitation under Texas Law was admitted by plaintiff in open court; and all other matters of controversy were disposed of by pleadings, leaving only the question of whether the service performed by plaintiffs for

defendant was "work," and what "rate of pay" would apply if it were construed to be "work" for which overtime pay was due under the Act. The stipulated facts were that all seven employees worked during daylight hours for 44 hours per week, which was later reduced to 42 hours, and then to 40, as the maximum number of hours was reduced under the Act, as elevator operators and in general fire-prevention work. In addition to this day work, each of these plaintiffs (petitioners herein) was required (Tr. p. 37) to spend 3½ to 4 nights per week, according to a regular schedule (Tr. pp. 39 to 41 and 48 to 50), in the fire hall located at the defendant's plant. During these nights on duty, the plaintiffs had no particular duties to perform, but were required to remain in or near the fire hall to answer any alarms of fire or other casualty (Tr. p. 37). The stipulation reflects that there were very few alarms during the period in question. The stipulation shows that the plaintiffs were paid $27.00 to $29.00 per week for their regular work, but were paid nothing for nights on duty except on the occasion of answering an alarm at night plaintiffs were paid fifty cents, and later sixty-four cents, for each alarm, which usually took only fifteen to thirty minutes' time for each alarm (Tr. pp. 45, 52, 53). The stipulation reflects that plaintiffs did not live on the premises of the defendant, but rather that they maintained separate residences (Tr. p. 37).

The plaintiffs (petitioners herein) brought this action to recover pay for these nights spent by them in the defendant's (respondent herein) fire hall, claimed due them under the provisions of the Fair Labor Standards Act of 1938.

The trial court found for the defendant (respondent herein) on the ground that, since the employees had no particular duties to perform, except on the rare occasions when there was an alarm, the time they were required to remain on their employer's premises did not constitute "hours worked." This holding was affirmed by the Circuit Court on June 1, 1943.

Although the Circuit Court gave expression in its opinion to the effect that "the mere fact that a servant agreed to live on the place does not justify the conclusion that he is engaged in commerce, even though his employer may be." No finding was made that the employers were not engaged in commerce. Since the interstate character of employment was admitted by Swift and Company, both in its pleadings and in the agreed statement of facts (Tr. pp. 9 and 36), the mere reference by the Circuit Court does not give rise to that issue. Therefore, the identical issues are presented as were present in the trial of the case.

II.

JURISDICTION

(a) The jurisdiction of the United States Supreme Court to review this cause by writ of certiorari is granted in Judicial Code, Section 240, as amended by the Act of February 13, 1939, 43 Statutes 938, 28 U. S. C. A. 347 (a).

(b) The judgment of the United States Circuit Court of Appeals, from which writ of certiorari is requested, was rendered on June 1, 1943. This action is filed within the statutory time, being less than three

months from the final order of the court below, as is evidenced by the docketing and recording stamp of the Clerk of this Honorable Court.

(c) The decision of the court below involves the interpretation of a federal law which has not been, but should be, settled by this Court, and the decision rendered in this case on a federal question is probably in conflict with the applicable decisions of the Supreme Court of the United States. Wherefore, under Rule 38 (5)(b) of the Revised Rules of the Supreme Court of the United States, this discussion may be reviewed by this Honorable Court.

III.

PRINCIPAL QUESTIONS INVOLVED

(a) Where, as in the instant case, the plaintiffs were required by their employer to be present at certain hours of the night on certain days, according to a regular schedule prescribed by the employer, to answer emergency alarms of fire or other casualty, and during such periods the employees were not permitted to be elsewhere than on the premises of their employer, in readiness to perform such services, were they engaged in the service of their employer, and by such service were they in the *employ* of respondent, within the meaning of the Fair Labor Standards Act of 1938, governing such matters, and within the terms of their employment?

(b) Where the necessities of the employer, and the particular type of service to be exacted of the employees, as in this case, require the presence and at-

tendance of the employees on the premises of the employer, and where, but for such requirement, the employees would remain on their own premises and in their own residences, the fact that the employee is permitted by the employer to recreate himself, or sleep on the premises of the employer, except in such instances when emergency calls arise, is such time so spent by the employee on the premises of the employer "work" or "employ," within the meaning of the Fair Labor Standards Act of 1938; and where such time exceeds the statutory maximum hours of said Act, are such employees entitled to payment for overtime, and on bringing action are employees entitled to an additional equal amount as liquidated damages and reasonable attorney's fee, under the terms of the Fair Labor Standards Act of 1938?

(c) Inasmuch as it is undisputed that petitioners were employed by Swift and Company for daylight service, and that this service was extended into the night, by reason of which they were employed for a work-week beyond the forty-four hour limit, and, later, beyond the forty hour limit, and since, under the definition in Subdivision (g) of Section 3 of the Act, the term "employ" included "to suffer or permit to work," were appellants entitled to overtime pay calculated at one and one-half times the regular rate of pay which they were receiving for daylight work?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the court below involves the interpretation of a federal law which has not been, but should be, settled by this Court, and the decision rendered in this case on a federal question is probably in conflict with the applicable decisions of the Supreme Court of the United States. The federal statute involved in this decision is Section 7 of the Fair Labor Standards Act of 1938, 52 Statutes 1060, also 29 U. S. C. A., Section 207, which reads as follows:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

In the judgment by the court below, the Court held that this section of the Fair Labor Standards Act did not apply to employees during periods of inactivity, although they were required to remain on the employer's premises. By this decision the Court exempted the coverage of the Fair Labor Standards Act of 1938 to that whole section of employees such as nightwatchmen, maintenance men, firemen, and other employees who are required by their employers to be on the premises ready for work, but who may have periods of inactivity and waiting. Thus, the decision of the court below in this case does not merely affect your petitioners, but can be cited as authority for exempting from the Act of Congress a great body of workers who, within the clear reading of the statute, were intended by Congress to come within the provisions of this Act. Therefore, there is involved here an important federal question which this Honorable Court should review within its powers as granted by statute.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of the Supreme Court of the United States, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in this case, numbered and entitled on the docket, No. 10493, Jim Skidmore, et al, Appellants, versus Swift and Company, Appellee, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that judgment

herein of said United States Circuit Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

Dated this ..... day of ....., 1943.

MACK TAYLOR,
711 Fort Worth National Bank Building,
Fort Worth, Texas,
Attorney for Petitioners,
Jim Skidmore, et al.

Of Counsel,
R. CURTIS McBROOM,
Fort Worth Club Building,
and
FORBIS & LOVE,
Burk Burnett Building,
Fort Worth, Texas.

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1943

NO. _____

JIM SKIDMORE, ET AL.,
Petitioners
vs.
SWIFT AND COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

PREVIOUS OPINIONS

The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division (Tr. pp. 26 to 33), is not officially reported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which was rendered on June 1, 1943, is not yet officially reported. (Tr. pp. 63-66.)

II.

JURISDICTION

(a) The jurisdiction of the United States Supreme Court to review this cause by writ of certiorari is granted in Judicial Code, Section 240, as amended,

by the Act of February 13, 1925, 43 Statutes 938, 28 U. S. C. A. 347 (a).

(b) The judgment of the United States Circuit Court of Appeals, from which writ of certiorari is requested, was rendered on June 1, 1943. This action is filed within the statutory time, being less than three months from the final order of the court below, as is evidenced by the docketing and recording stamp of the Clerk of this Honorable Court.

(c) The decision of the court below involves the interpretation of a federal law which has not been, but should be, settled by this Court, and the decision rendered in this case on a federal question is probably in conflict with the applicable decisions of the Supreme Court of the United States. The federal statute involved in this decision is Section 7 of the Fair Labor Standards Act of 1938, 52 Statutes 1060, also 29 U. S. C. A., Section 207, which reads as follows:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for

his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

In the judgment by the court below, the Court held that this section of the Fair Labor Standards Act did not apply to employees during periods of inactivity, although they were required to remain on the employer's premises. By this decision the Court exempted from coverage of the Fair Labor Standards Act of 1938 that whole section of employees such as night-watchmen, maintenance men, firemen, and other employees who are required by their employers to be on the premises ready for work, but who may have periods of inactivity and waiting. Thus, the decision of the court below in this case does not merely affect your petitioners, but can be cited as authority for exempting from the Act of Congress a great body of workers who, within the clear reading of the statute, were intended by Congress to come within the provisions of this Act. Therefore, there is involved here an important federal question which this Honorable Court should review within its powers as granted by statute.

III.

STATEMENT OF THE CASE

The case is briefly stated in the petition which is printed with this volume, under heading "I" of the petition; therefore, for the sake of brevity, a statement of the case is not reprinted here.

IV.

SPECIFICATION OF ERRORS

(a) The Circuit Court erred in affirming the District Court, and erred in finding and holding that the time spent by your petitioners herein as employees in the fire hall of Swift and Company, the respondent herein, during which time they were subject to call at any minute to answer fire alarms or other casualty, did not constitute "hours worked," for which overtime compensation is due, under the terms of the Fair Labor Standards Act of 1938.

(b) The Circuit Court erred in affirming the District Court, and erred in failing to direct the District Court to enter a judgment for your petitioners, requiring Swift and Company to pay them for overtime work, calculated at time and one-half their regular rate of pay, the regular rate of pay being $27.00 to $29.00 for 40 to 44 hours of daylight work each week, inasmuch as the evidence which was stipulated and agreed to between the parties discloses that your petitioners, as employees for Swift and Company, were required by Swift and Company to remain each work-day and continue in the service of Swift and Company beyond and in excess of the 44 hours, and later 40 hours, per week, for which they were paid nothing, except in the event of answering an occasional fire alarm, for which they were paid 50 cents, and later 64 cents, for each alarm answered; and for an equal amount as liquidated damages; and for their attorney's fees, as provided for in the Fair Labor Standards Act of 1938.

V.

SUMMARY OF ARGUMENT

All matters of fact were stipulated and agreed to between the parties. There was no dispute that the petitioners, as employees of the respondent, were required, in addition to 40 to 44 hours per week as elevator operators or general relief men, to spend 54 to 56 hours per week at night in the respondent's fire hall, located at the plant site of the respondent's packing plant in Fort Worth, Texas. There are only two questions involved in this case, both questions of law: (1) whether or not those 54 to 56 hours per week spent in the fire hall were hours spent in the "employ" of the respondent within the meaning of the Fair Labor Standards Act of 1938; and (2) the question of determining what the regular hourly rate of pay was, for the purpose of computing overtime at time and one-half the regular rate of pay. The Supreme Court of the United States has not passed on either of these questions as they arise under the Fair Labor Standards Act of 1938; however, in cases which are cited below, the Supreme Court has rendered decisions in questions involving the meaning of "work" under the very closely related statute in the Hours of Service Act, 45 U. S. Code 61. In these decisions, the Supreme Court has laid down the principle that an employee may be working during periods of inactivity, but when he is under orders of his employer, and not at liberty to go away from the premises. The Supreme Court has also spoken concerning the computation of rate of pay, which is a guide in this

case, in *Overnight Motor Transportation Co. v. Missel* (below), and in *Walling v. A. H. Belo Corporation* (below). In these cases, as is shown by the fuller argument below, the regular rate of pay is the rate at which an employee is actually employed under his employment agreement.

The Circuit Court rendered a decision in this case which involves an important question of federal law, in conflict with the principles heretofore laid down by the United States Supreme Court and the decisions rendered by other Circuit Courts.

SUMMARY

POINT (a). The decision of the Circuit Court involves an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

POINT (b). The statute which is involved in this case is clear and unambiguous.

POINT (c). The Circuit Court in this case has decided an important federal question in a way probably in conflict with other applicable decisions of this Court.

ARGUMENT

POINT (a). The decision of the Circuit Court involves an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

The question of what period of time an employee is engaged by an employer constitutes "work," within the meaning of the Fair Labor Standards Act of 1938, does not appear to have been heretofore considered by the Supreme Court of the United States in any of the cases in which this statute has been involved. This becomes a very important question in determining what amount is due an employee by the terms of the said Act. In the instant case, there is no dispute between the parties as to what hours the employees were required by their employer to be on duty. There was no question as to what the duties were during the various periods which the employees were required to remain on duty. The matter was presented to the trial court on an agreed statement of facts (see Tr. pp. 36-56). Very briefly, this record shows that the employees, your petitioners herein, worked 44 hours, and later 40 hours, per week on a daytime shift, from 7:30 a. m. to 4:30 p. m., 5 days per week, with one-half hour off for lunch. During this period they were employed as elevator operators and in general fire hall duties. Then, for a period of from 54 to 56 hours per week, your petitioners, as employees of Swift and Company, were required to spend the night in the fire hall on the premises of their employer. The stipulated facts show that the employees had other places of residence (Tr. p.

37), but that for four nights per week, and later 3½ nights per week, they were required, after their day duties in the plant, to return to the plant and spend the night at the plant. On these nights they were not privileged to leave the plant, but rather had to be on the premises, available in case of fire or other emergency (Tr. p. 37). For this night work the employees were paid 50 cents, and later 64 cents, for each alarm which they answered, but during the entire period involved there were only emergency calls on about thirty occasions (Tr. pp. 45, 53, 55).

The stipulation shows further that the employees were paid $27.00 each week for their regular work, and that the only pay they received for the nights which they spent in the fire hall was the 50 to 64 cents paid for each alarm answered.

Lower courts have heretofore considered cases in which a similar working arrangement was involved under the Fair Labor Standards Act of 1938.

In *Fleming v. Rex Oil & Gas Co.*, 43 Fed. Supp. 950, the court ruled on a case where employees had long periods of inactivity; in his ruling the court said:

> "For the purpose of determining overtime compensation due to oil pumpers of defendant in accordance with the Act, there should be included as hours worked by such pumpers not only the hours that such pumpers were actually engaged in manual labor, but also such hours as they were charged by the terms of the understanding between them and the defendant, with substantial responsibility for the successful operation of the pumps under their charge; and including also the

periods during which they were obliged to remain on or near the premises to enable them to carry such responsibility properly."

Recently, the Eighth Circuit Court, in considering the case of *Johnson v. Dierks Lumber Co.*, 130 Fed. (2d) 115, in which the Court considered for what part of an employee's time compensation was due, the Circuit Court, relying on *MK&T Ry. Co. v. United States*, (below) said:

> "We do not think the Act (Fair Labor Standards Act) means that an employer may claim all of an employee's time and compensate him for only a part of it. An agreement to pay for only a part of the hours which an employee is required to serve is invalid. The purposes of Congress in enacting the statute cannot be thus frustrated."

In the case of *Travis v. Ray*, 41 Fed. Sup. 6 (Western District of Kentucky), the Court was faced with facts analagous to the facts in the instant case, and in considering the question of what hours were work under the Fair Labor Standards Act, said:

> "I am of the opinion that the waiting periods between trips should be included in the total number of hours for which the plaintiff was employed. It is, of course, possible for an employer to make a number of independent contracts of employment, each one of which calls for employment at a different period of time, or to make one contract calling for separate and independent jobs at different times. Under such a contract, the time between the two working periods would not be includ d. But the present situation is not of that nature. Considering all of the circumstances sur-

rounding the numerous trips between Paducah and Gilbertsville, it is quite evident that the plaintiff was expected to be on the job from 1:15 p. m., when he reported for duty, until 2:00 a. m., when he finally put the bus in the garage and went home. Although he was not actually operating the bus every minute of this period, yet he had to hold himself available and be ready for duty when the schedule called for another run to be made. The bus was available to receive passengers during the interim. Most of the layover time was at Gilbertsville, which was merely a stopping point. It was neither the starting point of each day's run nor the final resting place of the bus when the day's work was over. There was no station-house at Gilbertsville; it was not where the plaintiff made his home. The waiting time was not long enough to permit him to go elsewhere or to engage in other activities. Minneapolis & St. L. Ry. Co. v. United States, 8 Cir., 245 F. 60. The evidence shows that it was at least an implied term of the contract that the plaintiff remain in the immediate vicinity of the bus in order to protect it and to take on the passengers who might arrive during the waiting interval. Performing the duties of a watchman, or being on duty subject to call if one's services should be required, is just as much employment in the legal sense of the term as actual labor. Missouri, K&T Ry. Co. v. United States, 231 U. S. 112, 34 S. Ct. 26, 58 L. Ed. 144; Chicago, R. I. & P. Ry. Co. v. United States, 8 Cir., 253 F. 555."

In the case of *Sunshine Mining Co. v. Carver*, 41 F. Sup. 60, the Court, in considering a similar question as to what hours were work, made the following statement:

"First, should the time spent in travel from the portal of the mine and descending to the usual place of work and returning to the portal be included in 'hours worked'? The answer under the evidence should be in the affirmative, for the place designated at the portal of the mine on its premises is the place where the workmen are to appear at a specified time. The workman offers himself there at a specified time and is under the control and direction of plaintiff who agrees to designate the place of work and the manner provided by it, and who created the situation necessary in operating its mine. It may be short distance or a long distance from the portal of the mine, therefore such travel time consumed from the time the workman appears at the portal of the mine and the travel time consumed to their designated place of work and the travel time consumed in returning to the portal of the mine should be considered and included in 'hours worked.' Employment of the workmen, under such circumstances, begins when they reach such entrance of the mine, as said by the Supreme Court in Bountiful Brick Company, et al, v. Giles, 276 U. S. 154; 48 S. Ct. 221, 222; 72 L. Ed. 507; 66 A. L. R. 1402."

In *Walling v. Sun Pub. Co.*, 47 F. Supp. 180, in considering hours when employees were on duty but had no particular tasks to perform, in a case which was brought under the provisions of the Fair Labor Standards Act, the Court held:

"The hours for which employees must be compensated at the standards prescribed in the Act include not only the hours that employees were actually engaged in manual labor, but also such

hours as they were obliged to remain on or near the premises to enable them to carry out the tasks for which they were responsible. In particular, the radio engineers are entitled to compensation for the periods they are on duty between the half-hourly meter readings when they are responsible for the successful operation of the apparatus or equipment under their charge."

Also, in *Walling v. Allied Messenger Service*, 47 F. Supp. 773, the Court said:

"Time spent by defendant's messenger employees in waiting for calls is time worked, and must be compensated for according to the provisions of the Act."

The trial court and the Circuit Court relied heavily on a statement taken from *Interpretative Bulletin No. 13 of the Wage and Hour Division (1941 Wage Hour Manual 144)*, which he set out in his Memorandum Opinion. We shall discuss this interpretation in light of the facts in the subject case. The Administrator says in the Interpretative Bulletin, Par. 7:

"In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again."

"Similarly, caretakers, custodians, or watchmen

> of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits."

All of this part of the interpretation depends on the employee's making "his home at his employer's place of business." In the case at bar there is nothing to indicate that the appellants made their homes at appellee's plant, but it is stated in the stipulation that "each of the plaintiffs * * * would say that he maintains a residence * * * ." There is no indication that appellants live at the appellee's plant, but rather that they were required to spend 4—later 3—nights a week away from their homes, as required by the appellee's schedule of work.

The facts in the case at hand are that appellants were required "to remain in the fire hall and stay in it, or within hailing distance." They were not free to "come and go." Had they been free to come and go, there would have been no occasion for them to stay at all. The plant was a place of duty, not of residence or domicile. There was no advantage for the employee to remain, and the premises were not those of refreshment or of recreation.

It appears then, after analyzing the facts in the case, that the Administrator's Interpretation does not support the finding of the courts below, and the courts erred in relying on it in hold that to remain at night on the premises of the employer did not represent "work."

While discussing the Interpretative Bulletin No. 13 of the Administrator of the Wage and Hour Division, we wish to call this Court's attention to paragraphs 2, 4, 5, 6, and 8 of the Bulletin:

> Paragraph 2. " * * * As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises, or to be at a prescribed work place, and (2) all time during which an employee is suffered or permitted to work, whether or not he is required to do so. * * * "
>
> Paragraph 3. " * * * Hours worked are not limited to the time spent in active labor, but include time given by the employees to the employer, even though part of the time may be spent in idleness. * * * "
>
> Paragraph 5. " * * * Ordinarily, periods of inactivity during which employees are on duty should be considered hours worked. * * * In these cases, the employee engages in active work intermittently, but his time is not his own while he remains conveniently available to carry out the instructions of his employer."
>
> Paragraph 6. "In a few occupations, periods of inactivity need not be considered as hours worked, even though the employee is subject to call. * * * In these cases, the nature of the employee's work involves long periods of inactivity which the em-

ployee may use * * * to carry on a normal routine of living. * * * *"

Paragraph 8. "In some cases, employees may be subject to call after the completion of their regular working day. * * * If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered as hours worked. * * * *"

Taking the Interpretative Bulletin as a whole, and not picking out any isolated statement, there is not any reasoning which would relieve the appellee of its employment obligations in the case at hand. If the appellants had lived in company houses with their families, even on the premises of the appellee, or had the appellants been permitted to come and go, being subject to call when "off duty," it is probable that they could not be considered at work, but the facts show that they had to stay "in the fire hall, or within hailing distance" on a regular set schedule of hours,—not at home, but at the appellee's plant.

In citing the Interpretative Bulletin, we do so chiefly due to the reliance of the Courts below in its wording. The bulletin itself says that it is only a guide for the Administrator, "unless he is directed otherwise by authoritative rulings of the courts. * * * *" (Par. 1, I. B. 13.)

Under the Fair Labor Standards Act, a number of cases have been brought in federal courts in various parts of the United States on the question of whether or not watchmen were entitled to the benefits of the Fair Labor Standards Act of 1938. Although in most of these cases the question of "work" as we have it

here was not raised as an issue, it is called to the Court's attention that in these decisions the watchmen were considered entitled to the benefits of the Act. In the present case, the hours spent at night on duty in the fire hall at Swift and Company's packing plant in Fort Worth, Texas, can be compared to the service rendered by a watchman, in that they were present on the premises of the employer to protect his property in case of fire or other casualty. A few of the cases in which watchmen have been held to come within the scope of the Fair Labor Standards Act are: *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40; *Lefevers v. General Export Iron & Metal Co.*, 36 F. Supp. 838; *Williams v. General Mills*, 39 F. Supp. 849; *Green v. Riss & Co.*, 45 F. Supp. 648; *Fleming v. A. B. Kirschbaum*, 316 U. S. 515. The Circuit Court by its decision would overthrow the application of the Act in all of these cases during periods when the employees were inactive.

The question of federal law decided by the Circuit Court in this case becomes an important federal question, since it involves the interpretation of a statute which affects a great body of employees through the whole of the United States. If this decision is permitted to stand, all of those employees—many of them among the most poorly paid groups—will be exempted from the overtime provisions of the Fair Labor Standards Act of 1938, which Congress intended for their protection. It is, therefore, requested by your petitioners that the Supreme Court exercise its power of review, to the end that all lower courts may be finally and completely directed as to what is meant by the word

"employ," within the meaning of the Fair Labor Standards Act of 1938.

POINT (b). The statute which is involved in this case is clear and unambiguous.

The question in this case involves the interpretation of Section 7 of the Fair Labor Standards Act of 1938 (below) which reads as follows:

> "Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The Circuit Court, in its opinion (Tr. p. 65), ignored completely the matter of service which your petitioners were rendering their employer, Swift and Company, but rather read into this section of the statute matters which are not there at all. The Court said:

"The Act does not require payment of wages to

> an employee merely because he is away from home. Nor does the Act undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed. 'Working' is not synonymous with 'availability for work.'" (Tr. p. 65.)

The Court ignored the fact that the employee was rendering a service to his employer, and suffering inconvenience to himself.

Were this a proper interpretation of the statute, that service which was performed by any guard, nightwatchman, maintenanceman, or other employee who chiefly served his employer by being available in case of an emergency, but who is for long periods of time inactive, would be exempt from the coverage and application of this statute. Nowhere in the Act does Congress indicate that such was its intention. Rather, it was clear that Congress intended that any employee who comes within the coverage of the Act should be paid time and one-half his regular rate of pay for all hours worked in excess of the maximum hours set forth in the Act.

Your petitioners would further show that the statute clearly provides for the payment of overtime at time and one-half the regular rate of pay for overtime work. As to the payment of the amount of overtime in such cases, the United States Supreme Court, in *Walling v. A. H. Belo Corporation*, 86 Law Ed. 1166 (decided by the United States Supreme Court on June 8, 1942), recognized that it was necessary to look at the contract or employment practice, in order to determine the "regular rate" in each case presented. In upholding

the decision in that cause, as found by this Honorable Court, Mr. Justice Byrnes said:

> "In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term, 'regular rate.' But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract."

Although Justice Reed wrote a long, dissenting opinion, in which he treated the "contract" in the Belo case as a fiction, he followed the majority opinion, and based the argument on the rule of law, as set out above,—that the "regular rate" may be established by contract. There is no disagreement between the rule laid down by the court in the Belo case and that laid down the same day by the Supreme Court in *Overnight Motor Transportation Co. v. Missel*, 86 Law Ed. 1159. This later case simply involves a situation where an employee was employed and working "by the week, with no agreement as to hours to be worked for a stipulated wage." The court held that in the absence of any contract or agreement, the "regular rate" was determined simply by dividing the total wage by the hours worked for each week.

There is ample evidence in the record of the instant case that the appellants were paid by the appellee for only 40 to 44 hours which they worked in the daytime and that all they were paid for their night work was the 50 to 64 cents which they were paid on the occasion of answering an alarm. The trial court in his findings found:

"(6) Plaintiffs were each paid a weekly salary running from $27.00 to $29.00 per week, and in addition, they were paid for answering fire alarms the sum of fifty cents for each alarm until January 1, 1940, and thereafter sixty-four cents for each alarm."

"(8) None of the plaintiffs worked in general fire hall duties, consisting of keeping in proper condition the plant fire-fighting equipment, etc., or as elevator operators or as relief men, more than the maximum 44 or 42 hours provided by the Act, but after October 24, 1940, when the 40 hour work week provision of the Wage and Hour Law became effective, there were a few occasions —about a dozen or more—during the entire period of time involved, when defendant paid, and one of the plaintiffs accepted additional compensation for work performed as elevator operators and relief men in excess of 40 hours per week, **at a rate equal to 68c per hour for each such excess hour,** and on a few holidays one of the plaintiffs was paid double time."

"Plaintiffs have been compensated at a lawful rate for all of their work in general fire hall duties, such as keeping on proper condition the plant fire-fighting equipment such as hose, sprinkler system, extinguishers and barrels, and as elevator operators and relief men." (Tr. p. 32.)

When these three findings are read together, it clearly appears that the trial court was treating the $27.00 to $29.00 weekly wage as pay for the daytime work which occupied the appellants for from 40 to 44 hours per week, and that the only pay for the nights which the appellants spent in the appellee's fire hall was the 50 to 64 cents which they were paid on the occasion of

answering an alarm at night. The overtime pay which the Courts below should have found in a judgment for the appellants should have been computed on a regular hourly rate of pay, determined by dividing the salary paid by the 40 to 44 hours daylight work.

That this was the actual hourly rate of pay of the appellants was established by the respondent itself during the course of the employment, as is shown by the record, in that on occasions when the appellants performed daylight work in excess of the 40-hour week, after October 24, 1940, they were paid at the rate of 68 cents per hour (Tr. p. 47); and it is further shown that this was the actual regular rate of pay by the evidence in the record that in weeks in which the employees worked in day duties as firemen or elevator operators as much as 48 hours per week, they were paid, instead of $27.00, $32.40, or at the rate of 67½ cents per hour (32.40 divided by 48) (Tr. p. 47). And it is further shown that the salary, even in the case of the two men who were occupied only in general fire hall duties, was for their daylight work as firemen. (See Explanation in Transcript, p. 55, which provides that the salary was paid, regardless of whether they worked 35, 40, 41, or 44 hours.).

Reference throughout the argument has referred to all of the appellants generally, not distinguishing one from another. Those references to extra pay for hours over 44-42-40 and to docking are not shown in the record to include appellants Millican and Dennis, but their inclusion in the argument is not with the intention of misleading the Court, but rather due to the fact that neither of these employees ever worked in their

daytime duties in excess of 44 hours per week (Tr. p. 55). Their entire record indicates that their schedule of hours,—that is, day work and time spent in the fire hall—is identical with that of the other appellants. We again call the Court's attention to the stipulation, "These men were paid their regular salaries, regardless of whether they worked 35, 40, 41, or 44 hours per week." (Tr. p. 55.) It is clear that their salaries were compensation only for the daytime work; that is, for the 41½ to 44 hours they worked as firemen, and was in no part pay for the night hours they spent in the fire hall,—50 to 58 hours per week. Therefore, their regular hourly rate of pay must be computed on the same basis as set out above, and for this reason no distinction has been made between any of the appellants in arguing this proposition. The record establishes that all appellants' regular rate of pay was from 61½ cents to 72½ cents per hour, as determined by the daylight hours worked during various periods of the petitioners' employment by respondent concerned in this cause.

There is no authority which would permit the computation of the regular rate of pay for the purposes of Section 7 of the Fair Labor Standards Act in any other way than outlined above.

The case at bar is analagous to the Belo case, supra, in that, although there was no written agreement, there was none-the-less the contract created by custom and practice, and under this agreement, the "regular rate" was established, not only on a weekly basis, but on an hourly and daily basis; that is, $27.00 to $29.00 for 40 to 44 hours day-work as "general fire hall men,"

or as "elevator operators and general relief men" (Tr. pp. 46-54); $5.40 per day (Tr. p. 43), and 64 cents (later 68 cents) per hour (Tr. p. 56). In addition, they were paid for their night duties, when answering alarms, 50 cents (later 64 cents) for each alarm answered (Tr. p. 45). There was no other pay for the night work, as far as this record can show. But in the District Court the appellee argued that, as a matter of law, if the court should find that the hours which appellants were required to be on duty at night was work for which appellants were entitled to overtime pay, then the Court should find that the $27.00 to $29.00 paid as salary should be construed to have covered the night hours worked also. But in the same argument the appellee said that this was not work, and that the appellants were paid in full at a legal rate for the 40 to 44 hours per week for their daytime work in "general fire hall duties" and "elevator operators and general relief men."

An employer cannot thus flee to the courts for protetcion to reduce the liability he may have incurred by refusing to recognize certain hours spent by his employees in service as work. In *Sklar Oil Corp. v. Thompson*, 126 Fed. (2d) 872, the Circuit Court for the Eighth Circuit held that where the records of the employer showed that a regular rate of pay was established for a definite number of hours worked per week, but that the employee had worked additional hours for which he had not been paid anything, that in computing overtime pay due for these hours, the regular established rate of pay was the basis for computation under the terms of the Fair Labor Standards Act,

—and a regular rate had been established. The Court said:

> "Its (appellant, Sklar Oil Corporation) only contention in this regard is that the flat salary employment precludes computation at an hourly rate. This contention, of course, falls away in the presence of appellant's own records."

There is no conflict between the Sklar case, supra, and the case of *Bumpus v. Continental Baking Co.*, 124 Fed. (2d) 548, in which the Sixth Circuit Court, in applying the "regular rate" in the absence of any agreement as to the hours to be worked for a weekly salary, held that an employer could not come in under the provisions of the statute and say that, since the pay was over the minimum provided by law, he had complied with the law. The Court said:

> "To lessen the regular rate of pay in interpretation, where in fact it was a rate established, would defeat this section (Section 7) of the Act."

The work performed by the employees (your petitioners) for Swift and Company at night was a part and a continuation of their daylight employment, and, as has been shown on the authority of the courts, such time is "work," for which employees are due pay, under the terms of the Fair Labor Standards Act. *Walling v. Sun Publishing Co.*, supra; *Walling v. Allied Messenger Service*, supra, and *Bountiful Brick Co. v. Giles*, supra. Such employment being work, then the Court erred in failing and refusing to find that appellants were entitled to judgment against appellee for all the hours worked at night; and, since the record shows

that the employees had been paid for the 40 to 44 hours per week which were the maximum hours under the statute, these night hours were overtime hours for which the court should have given judgment at time and one-half the "regular rate" at which the appellants were employed, or 61½ to 72 cents per hour.

POINT (c). The Circuit Court in this case has decided a federal question in a way probably in conflict with other applicable decisions of this Court.

In its opinion, the Circuit Court made no reference to any case which had been cited by either the appellant or appellee, nor to any previous decision by any other court (Tr. pp. 63-66). Rather, the Court shows as its only authority paragraph 6 of Interpretative Bulletin No. 13 of the Wage and Hour Division, supra, which makes reference to a switchboard operator in a small telephone exchange who has her bed alongside the switchboard, and has several hours of non-interrupted sleep. In using paragraph 6 of the Interpretative Bulletin, the Court failed to cite the full paragraph, and particularly made no reference to the last sentence of the paragraph, which concludes that the employee may "carry on a normal routine of living. * * * "

As was pointed out under Point (b) of this argument, when the whole Interpretative Bulletin is taken together, it is in no way authority for the opinion rendered by the Court, but rather is authority for reversing the opinion of the court below.

Although there are no cases of record in which the Supreme Court has considered the meaning of "work"

or "employment," within the meaning of the Fair Labor Standards Act of 1938, nonetheless, the Supreme Court has given expression to the meaning of "work" and of "employment" in cases arising under other statutes. The interpretation given these terms by the Circuit Court is in conflict and at variance with the interpretation given by the Supreme Court to these terms in the cases wherein that term was involved under other statutes; therefore, your petitioners would urge the Court that the decision rendered by the Circuit Court in this case is probably in conflict with applicable decisions of this Honorable Court.

Where the question of the meaning of "work" or "employment" has arisen, lower courts in rendering their decisions have made reference to *MK&T Ry. Co. v. United States* (231 U. S. 112, 34 S. Ct. 26). In *Fleming v. Rex Oil & Gas Co.*, supra, in *Travis v. Ray*, supra, in *Johnson v. Dierks Lumber Co.*, supra, in *Walling v. Sun Publishing Co.*, supra, and in *Walling v. Allied Messenger Service*, supra, the courts have all made reference to the *MK&T Ry. Co. v. United States* case. In this case the Supreme Court had under consideration the meaning of what constituted "work" under the Hours of Service Act, 54 U. S. Code 61, which Act makes it unlawful for a railroad to require or permit certain of its employees to be or remain on duty for more than 16 hours. In this case the Court said:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that if it be deducted, they were not kept more

> than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait. United States v. Chicago, M&PS Ry. Co., 197 Fed. 624; United States v. Denver & RG Ry. Co., 197 Fed. 629."

In the case of *Sunshine Mining Co. v. Carver*, 41 F. Supp. 60, the District Court, in determining what period of time was "work" or "employment," under the terms of the Fair Labor Standards Act of 1938, cited United States Supreme Court decision in *Bountiful Brick Co. v. Giles*, 270 U. S. 154, in which the Court in a liability action determined what periods an employee was in the "employment" of his employer; the Supreme Court said:

> "In other words, the employment may begin in point of time before the work is entered upon, and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done."

It is very clear from the expression given by the Supreme Court in these two cases that the meaning of "work" or "employment" goes further than the actual manual or mental labor, but is that service which is rendered by an employee to his employer, or is that period of time which is spent by an employee for the benefit or service of his employer, as distinguished from the period which is wholly and completely at the disposal of an employee.

Your petitioners would respectfully urge this Court that the Circuit Court in its decision in the instant case rendered its judgment contrary to the probably applicable decisions of this Honorable Court.

VI.

CONCLUSION

In way of conclusion, your petitioners would cite the propositions which were submitted to the Circuit Court of Appeals, which that Court, by its decision, held to be false propositions:

(a) Where, as in the instant case, the plaintiffs were required by their employer to be present at certain hours of the night on certain days, according to a regular schedule prescribed by the employer, to answer emergency alarms of fire or other casualty, and during such periods the employees were not permitted to be elsewhere than on the premises of their employer, in readiness to perform such services, they were engaged in the service of their employer, and such service represented work, within the meaning of the Fair Labor Standards Act of 1938, governing such matters, and within the terms of their employment.

(b) Where the necessities of the employer, and the particular type of service to be exacted by the employees, as in this case, require the presence and attendance of the employees on the premises of the employer, and where, but for such requirement, the employees would remain on their own premises and in their own residences, the fact that the employee

is permitted by the employer to recreate himself, or sleep on the premises of the employer, except in such instances when emergency calls arise, such time so spent by the employee on the premises of the employer is work, within the meaning of the Fair Labor Standards Act of 1938, and where such time exceeds the statutory maximum hours of said Act, such employees are entitled to payment for overtime, and on bringing action employees are entitled to an additional equal amount as liquidated damages and reasonable attorney's fees.

(c) Inasmuch as it is undisputed that appellants were employed by Swift and Company for daylight service, and that this service was extended into the night, by reason of which they were employed for a workweek beyond the forty-four hour limit, and, later, beyond the forty hour limit, and since, under the definition in Subdivision (g) of Section 3 of the Act, the term "employ" included "to suffer or permit to work," appellants were entitled to overtime pay calculated at one and one-half times the regular rate of pay which they were receiving for daylight work."

Not only have the courts below, in their opinions, given expression to this important federal law contrary to applicable decisions of other lower courts and of this Court, but by their decisions they have taken away an important sector of federal legislation enacted by the Congress which guaranteed to working men that they would be paid reasonable compensation for long hours of service, and which guaranteed to the Nation that employment would not be curtailed during periods of depression by the expediency of extending hours

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 18

JIM SKIDMORE, ET AL., *Petitioners*

v.

SWIFT & COMPANY, *Respondent*

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division is reported in 53 Fed. Supp. 1020 (R. 26). The opinion of the United Circuit Court of Appeals for the Fifth Circuit is reported in 136 Fed. (2d) 112 (R. 62).

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered June 1, 1943. Petitioners filed their motion for a writ of certiorari with the Supreme Court within the time provided by statute. The Supreme Court granted the motion for writ of certiorari under the authority conferred by Judicial Code, Section 240, as amended by the Act of February 13, 1939, 43 Statutes 938; 28 U. S. C. A.

347 (a), and by Rule 38, paragraph 5 (b) of the Rules of the Supreme Court, as revised February 13, 1939.

The federal question involved in this cause concerns The Fair Labor Standards Act of 1938, and particularly Section 7 (a) of the said Act, 52 Statutes 1060; 29 U. S. C. A. 207, which reads as follows:

> "Section 7 (a)—No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in interstate commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

STATEMENT OF THE CASE

Your petitioners originally brought this action in the United States District Court for the Northern District of Texas, Fort Worth Division. The action was brought under the provisions of the Fair Labor Standards Act of 1938, hereinafter referred to as the ACT, to recover overtime pay from the respond-

ent, Swift & Company, their employer. The District Court rendered judgment in favor of the respondent, and appeal was taken by petitioners to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court. Your petitioners filed their motion for a writ of certiorari which has been granted.

The case was tried before the District Court, without jury, and all of the facts were presented to the court by a stipulation of agreed statement of facts (R. 36 to 56). Before coming to trial all issues save two were disposed of. These two issues were, (1) What constitutes "work" within the meaning of the Act, and (2) How is "regular rate of pay" determined within the meaning of the Act on the basis of the facts presented.

The facts in the case may be briefly summarized as follows: Your petitioners, Jim Skidmore, W. W. Rousey, E. Phennell, H. Millican, R. Roark, Tom Dennis and Ted Hayes, had for a number of years prior to October 24, 1938, the effective date of the Act, been employed by the respondent, Swift & Company, in its meat packing plant in Fort Worth, Texas (R. 37). Petitioners Tom Dennis and H. Millican had been exclusively engaged in maintaining fire fighting equipment (R. 36). The other petitioners worked as elevator operators in the plant and as relief men for Dennis and Millican on their days off (R. 36). The aforementioned work, operating elevators and maintaining fire fighting equipment was performed during the day light hours between 7:00 A. M. and 3:30 P. M., each of the petitioners working five days

per week (R. 37). Each man was paid a weekly wage from $27.00 to $29.00 (R. 38).

In addition to the daytime work each petitioner was required to remain, and did remain on duty, four and later three and one-half nights per week in the fire hall at the respondent's plant to be on call in the event of fire or other casualty (R. 37). On these nights each petitioner was required to remain from 5:30 P. M. until 6 A. M. the next morning, pursuant to a schedule (R. 39, 40, 48, 49), in or within hailing distance of the fire hall, but there was no occasion to do more than remain there unless an alarm sounded (R. 37). On these nights respondent permitted petitioners to read, play dominos, listen to the radio, or sleep, so long as they remained "in or within hailing distance of the fire hall" (R. 37). In the event an alarm was answered the man answering was paid 50 cents, and later 64 cents (R. 43, 52). During the period of more than two years in question petitioners were required to answer only 29 alarms, for which they were paid at 50 cents or 64 cents each (R. 45, 53).

After October 24, 1938, the effective date of the Act, petitioners were required to continue in the fire hall at night just as they had prior to that time (R. 36). However, when one of the petitioners worked more on his daytime duties than the maximum number of hours permitted under the Act in any one week he was paid for this over-time at the rate of 68 cents per hour (R. 56). The record does not show that prior to October 24, 1940 any petitioner ever worked in excess of the maximum legal hours in a week on his daytime work (R. 39, 40, 54). The record in-

dicates that on eight occasions Dennis and Millican did work more than the maximum legal number of hours on their daytime work from one to four hours and were not paid any overtime, and except for the periods noted they were never required to work overtime during daytime work (R. 55). In the event one of the petitioners was absent from his daytime duties his weekly salary was "docked" $5.40 until January 1, 1940, and thereafter at the rate of 64 cents per hour, if the absence involved less than a full day (R. 43).

The record shows that each of the petitioners maintained a residence of his own (R. 37).

In finding for the respondent the District Court expressed the opinion that since there was no work to perform, except on the few occasions when there were fire alarms, that the time spent in the fire hall by the petitioners was not "hours worked" within the meaning of the Act (R. 27). The Circuit Court in affirming the judgment of the District Court expressed the opinion that "the Act does not require payment of wages to an employee merely because he is away from home" (R. 63).

SPECIFICATION OF ERRORS

(1). The District Court erred in its conclusion of law in finding: "The time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the

Courts," and the Circuit Court erred in upholding and affirming this opinion.

(2) The District Court erred in rendering judgment for the respondent, and the Circuit Court erred in affirming that judgment.

(3) The District Court erred in refusing to render judgment in favor of petitioners for overtime pay computed at one and one half times the regular rate of $27.00 to $29.00 for a 40 to 44 hour workweek, inasmuch as the evidence discloses that petitioners were required as part of their employment to remain in respondent's service in excess of 44 hours and later 40 hours per week, and were nevertheless paid nothing for this extra duty, except in instances where they answered an occasional fire alarm and in which cases they received 50 cents and later 64 cents for each alarm answered. The Circuit Court erred in affirming the judgment of the District Court, and in not remanding the case.

(4) The District Court erred in failing to render judgment for the petitioners for an additional amount of money equal to the amount of overtime due, as liquidated damages, and for attorney's fees as provided by the Act.[6] The Circuit Court erred in not reversing the judgment of the District Court and in failing to instruct the trial court to render judgment for liquidated damages and for attorney's fees.

SUMMARY OF ARGUMENT

In its opinion the District Court held, in effect, that unless an employee was busy doing something for

his employer he was not "working" within the meaning of the Fair Labor Standards Act of 1938, hereinafter referred to as the ACT, and that therefore he was not entitled to overtime compensation for time he might spend on his employer's premises pursuant to a contract with the employer holding himself in readiness to perform services the subject of contract. The Circuit Court upheld the District Court, and went further saying, "Nor does the Act undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed." The opinions of the courts below were made without recognition of the facts that in the instant case your petitioners were required by the terms of their employment to remain on the respondent's premises, away from their own homes. Both the District Court and the Circuit Court gave expression to the belief that a person was not to be considered as "working" within the meaning of the Act since he was permitted by the indulgence of his employer to listen to the radio, sleep, play games and recreate himself, even though he was required to be present and ready at any moment to answer any call of fire or other casualty in the respondent's plant, and was not free to leave the premises. The lower courts made no reference in their opinions to the fact that the petitioners gave up their freedom of action, including the privilege of spending evenings with their families at home, for the service of the respondent.

The lower courts further failed to take account of the intent of Congress as expressed in the Act, requiring an employer to make additional payments for excessive hours of work.

Although the Act itself does not define what is meant by "work," other than to say that "employ" includes to suffer or permit to work," the Supreme Court in cases under other Federal Statues has defined the meaning of "work" or "on duty" in the cases of *M. K. & T. Ry. v. United States*, 231 U. S. 112, and in *Boautiful Brick Company v. Giles*, 276 U. S. 154. Other lower courts have given expression to the meaning of these terms within the meaning of the Fair Labor Standards Act itself: *Walling v. Allied Messenger Service*, 47 Fed. Sup. 775; *Travis v. Ray*, 41 Fed. Sup. 6; *Fleming v. Rex*, 43 Fed. Sup. 950; *Johnson v. Dierks Lumber Co.*, 130 Fed. 62d) 115. In each of these cases the respective courts held that when an employee was on his employer's premises waiting for some circumstance to occur which would require his activity in his employer's interest that the employee was in the "employ" of his employer, and entitled to pay under the terms of the Act.

It has at all times been the position of your petitioners that the wording and intent of the Act entitled them to overtime compensation at a rate of one and one half times their regular rate of pay for all the time they were required to be present, and were in fact present, at respondent's plant in excess of the maximum number of hours provided by the Act during any one workweek. It has also been consistently contended by petitioners that the record reflects that their regular rate of pay was as established by the respondent, their weekly salaries for the maximum number of hours permitted by the Act.

ARGUMENT

I

THE TIME WHICH PETITIONERS WERE REQUIRED TO STAY IN THE RESPONDENT'S FIRE HALL CONSTITUTES "WORKING TIME" WITHIN THE MEANING OF THE ACT, REGARDLESS OF THE FACT THAT PETITIONERS WERE PERMITTED TO RECREATE THEMSELVES AND SLEEP DURING THE TIME THEY WERE NOT ACTUALLY ANSWERING ALARMS.

It is clear from the record that the petitioners were required, and in fact did, stay in the respondent's fire hall on certain nights of each week during the period in question, after they had performed a full day's work in the respondent's plant. During these nights on duty nothing was required of petitioners other than to be present at the fire hall to respond to calls in the event of fire or other casualty (R. 37). They were permitted to read, listen to the radio, play games, or sleep during periods when there were no duties to perform, but during those periods they were not permitted to absent themselves from respondent's premises nor to visit their own homes (R. 37).

The respondent contended that since petitioners were not required to do anything except to be present to answer calls during the hours in excess of the maximum provided by the Act in any week, that these excess hours did not constitute "work" or "period of employ" for which overtime compensation was due under the Act.

This District Court apparently accepted this reasoning, for after discussing the privileges the petitioners had, it said, (R. 27),

> "Of course we know pursuing such pleasurable occupations or performing such personal chores,

> does not constitute work. But does the fact they were subject to calls, though rare, make such hours, so spent, work hours under the Act for which overtime compensation is due them. That is the initial question. I do not think so."

The Circuit Court affirmed the District Court, and went further, discussing the fact that petitioners agreed to remain on the premises, saying, (R. 64),

> "The Act does not require the payment of wages to an employee merely because he is away from home. Nor does the Act undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed. 'Working' is not synonymous with 'availability for work'."

The purpose of Congress in adopting the Fair Labor Standards Act was not to permit an employer to evade its requirements by the subterfuge of allowing his employees to rest and relax and at the same time to require them to be at places designated by the employer to perform certain work when and if the occasion arose for the performance thereof. The "standing by" of employees at such designated places, ready, willing and able to perform such work does not delimit their status as employees.

The Circuit Court in *Murray v. Nobleseille Milling Company* (7-Cir.) 151 Federal (2d) 470 (l. c. 472) succintly stated the purpose of the Act in this language: "—the purpose of the overtime provision of No. 7 was to apply financial pressure upon the employer to reduce hours of work and spread employment."

It is clear that in the instant case the respondent was undertaking to circumvent the provisions of the

Act. Had it abided by the terms of the Act the petitioners would not have been required to remain on duty at night after having performed during daytime the maximum hours set out in the Act.

In the final analysis it is for the courts to say what constitutes "work" in each particular case, but it is evident that Congress was not attempting to delimit the term "work" or "employment" with any statutory definition, for none is present, except to say the "Employ includes to suffer or permit to work." If in deed the service performed by petitioners was work in the general broad conotation of the word then respondent has failed to observe the letter and the spirit of the law.

It is submitted that both the District Court and the Circuit Court in considering the questions presented in this case failed to consider that petitioners remained at the plant, in the fire hall nights primarily and entirely in the interest of the respondent. It is clear from the record that petitioners were required by respondent to remain in the fire hall after having completed a full day's work in the plant. That the respondent, with the ordinary indulgence of an employer interested in retaining the good will of his employees, permitted petitioners to recreate themselves, does not operate to exempt it from the requirements of the law.

It is unnecessary that an employee be physically performing work in order to be considered "working," rather it may be that during periods of complete inactivity an employee is "working" within the meaning of the Act and within the general meaning of

the term "work." Although this direct question has not been presented to this court as it arises under the Fair Labor Standards Act, other courts have in a number of cases dealt with the precise issue:

Fleming v. Rex, 43 Fed. Supp. 950, was an action instituted by the Administrator of the Wage and Hour Division of the U. S. Department of Labor to enjoin an employer from working certain employees on an oil lease for hours in excess of the maximum provided under the Act, without the payment of ove time, and there the court said:

> "For the purpose of determining overtime compensation due to oil pumpers of defendant in accordance with the Act, there should be included as hours worked by such pumpers not only the hours that such pumpers were actually engaged in manual labor, but also such hours as there were charged by the terms of the understanding between them and the defendant, with substantial responsibility for the successful operation of the pumps under their charge; and including also the periods during which they were obliged to remain on or near the premises to enable them to carry such responsibility properly. See M. K. & T. Ry. Co. v. United States, 231 U. S. 112. . . ."

A number of other cases have been considered by the lower courts in which they held that under the terms of the Fair Labor Standard's Act periods of inactivity may be considered as "hours worked" when the employee is required to be present on the job waiting for a call to activity: See *Travis v. Ray*, 41 Fed. Sup. 6; *Sunshine Mining Co. v. Carver*, 41 Fed. Sup. 560; *Sklar Oil Corp v. Thompson*; 126 Fed (2d) 872; *Walling v. Allied Messenger Service*, 47 Fed.

Sup. 775; *Walling v. Sun Publishing Co.*, 47 Fed. Sup. 180. In each of these cases the courts relied on the expression given to the meaning of "hours worked" by the Supreme Court in the case of *M. K. & T. Ry. Co. v. United States*, 231 U. S. 112, in which the Court said:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, subject to call, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait."

The court at present has before it the case of *Wantock v. Armour & Company*, 140 Fed. (2d) 356, which is closely analogous with the instant case as far as the facts are concerned with working hours, though the facts are different on the question of "rate of pay." In that case the trial court disallowed certain hours as hours of "work" when the employees were sleeping, and on appeal the employees did not raise the question, hence the question of sleeping time is not present. In the instant case the record is silent as relates the number of hours that the petitioners slept, except for the statement that "there was ample time for sleeping." (R. 37). In considering this question in the *Wantock Case* the Seventh Circuit Court said, "The correctness of the District Court's holding that time devoted to sleeping and eating should not be counted as part of overtime is not before us," indicating that there was some question in the Court's mind as to the propriety of such

holding. In the cases cited above, however, particularly in the case of *Fleming v. Rex*, supra, there was present the question of the hours devoted by the employee to sleeping, and the court held that so long as an employee was charged with the responsibility of the operation of the pumps that he was "working" within the meaning of the Act.

Your petitioners urge that no differentiation can be made in the instant case between hours devoted to sleeping and other hours spent by them in the fire hall for that they were on duty the full time. At no time were they leading a normal life. At no time during the hours embraced in their contracts could they leave the premises.

II

THE OPINIONS OF THE DISTRICT AND CIRCUIT COURT RENDERED IN THIS CAUSE ARE NOT SUPPORTED BY THE WEIGHT OF AUTHORITY.

A careful reading of the opinion of the Circuit Court discloses a reference to *IB 13* as the only authority cited. The District Court considered three cases in its opinion, *Cordell v. H. F. Wilcox Oil and Gas Co.* (U. S. Dist. Ct. N. D. Okla.) 5 labor cases, Sec. 60807; *Carlton v. London Mines & Milling Co.*, (Colorado District Court, Second Judicial District) 4 labor cases, 60699; and *Muldowney v. Seaburg Elevator Co., Inc.* (U. S. Dist. Ct. E. D. N. Y.) 4 labor cases, 60517. These cases were also relied on by the respondent. Your petitioners would call the Court's attention to the marked difference between the facts in those cases and the facts in the case at bar. In both the *Cordell* and the *Carlton cases* the employees lived with their families at the place of business of the employer. The facts in those cases reveal that the

employees could pursue a "normal course of living." Indeed the facts reveal in the *Cordell case* that the employee was permitted to come and go at will, frequently being absent from his place of employment for long periods of time. In the *Carlton case* the record shows that the employee built a home on the property of the employer and that he was free to work in and about his own home and premises much of the time which time he claimed should be paid for by his employer. In the *Muldowney case* the facts are clear that the employee was not *required* by his employer to remain at the plant, but rather he was permitted to, and did come and go much as he pleased. The facts in these three cases are so foreign to the facts in the instant case as to make them cases entirely unrelated. In the instant case the facts are clear that the petitioners did not live at the respondent's plant, but rather that they maintained residences elsewhere and were required by their employment to remain at the respondent's plant according to a regular schedule; that during the periods when they were required to be in the fire hall they were not allowed to come and go, but were required to be "in or within hailing distance" of the fire hall. (R. 37). A summary of the schedule of hours worked each week by the petitioners, including the hours on general fire prevention duties, on elevator duties, and periods which petitioners were required to be in the fire hall, is set out on page 16 summarized from the agreed statement of facts: (R. 39, 40, 41, 48, 49, 50).

The respondent, Swift & Company, required each of your petitioners to spend 4, later 3½, nights per week at the fire hall according to a regular schedule so

A. M.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.
12 to 6	Firehall	Firehall	Off	Firehall	Firehall	Firehall	Off
6 to 7	Time Off	Time Off	Off	Off	Off	Off	Off
7 to 3:30 P.M.*	Gen. F. H. or Elevator	Gen. F.H. or Elevator	Off	Gen. F.H. or Elevator	Gen. F.H. or Elevator	Gen. F.H* or Elevator	Off
Mid-day Lunch	Lunch	Lunch	Off	Lunch	Lunch	Lunch	Off
P. M.							
3:30 to 5:30	Time Off	Firehall	Off	Off	Firehall	Firehall	Off
5:30 to 12**	Firehall	Off	Firehall	Firehall	Off	Off	Firehall
Total Hours On Duty	20½	16	6½	20½	16	16	6½ — 102

*Prior Oct. 24, 1940. This period was extended to 5 P. M. on Saturday (or on one day per week for each man).

**After May 2, 1939. This was an "Off" period 4 days per week.

that there would always be some men on duty there. A schedule showing a typical work-week for one man, as summarized from the stipulated facts (see tr. p. 39, 40, 41, 48, 49, 50).

It is the contention of the respondent, Swift & Company, that only the time spent by the petitioners in performing "General Fire Hall Duties," that is maintaining fire fighting equipment, and in operating elevators was "time worked," and that the time petitioners were required to spend in the Fire Hall was not "work", nor a period of "employ" within the meaning of the Act. The respondent did not even show these hours in the Fire Hall as time for purpose of pay, as is shown by the schedule of pay. (tr. p. 46, 47, 52, 53).

It is clear and undisputed that your petitioners were "on duty" at the respondent's plant for 102 hours per week, with the variations in hours as indicated by the schedule. During these hours they were in the service of the respondent at his place of business, present and ready to perform any task assigned. They were not free to go home to their families, nor to leave the plant, but were required to stay "on the job" all of that time. It is true that during the night periods they were seldom called upon to perform any task, and that the respondent was tolerant and permitted the petitioners to listen to the radio, read and sleep, provided always that they remained "on the job." The duty performed at night can be compared to the duty performed by any municipal fireman, who remains at his station subject to call, but who has no additional duties to perform except to respond to fire alarms when sounded.

Both the District Court and the Circuit Court cited as authority for their opinions the Interpretative Bulletin No. 13 of the Administrator of the Wage and Hour Division. In the brief presented to this Court by the petitioners with their motion for writ of certiorari the pertinent paragraphs of this Bulletin were set forth, and for the sake of brevity they will not be discussed in detail here. However, it must be apparent to this Court that the lower courts applied paragraphs of the Bulletin to this case which do not conform to the facts. The lower courts relied upon the reasoning of the Administrator that where an employee lived on his employer's premises, and was simply on call, that then such on call hours might not be considered work. But the facts in the instant case are clearly contrary to the situation treated within that part of the Administrator's Bulletin. In this case the petitioners did not live at the employer's plant, but rather maintained residences of their own. (R. 37). Nor did they stay at the employer's plant in the course of "normal living," but rather they were required by their employment agreement to stay at the respondent's plant certain nights during each workweek in question. They were not "on call" in the sense that they were about their own business and subject to being called from their own homes, but rather they were required to stay away from their homes and at the respondent's plant, but they had nothing to do except when "called" by an alarm.

III

INASMUCH AS IT IS UNDISPUTED THAT PETITIONERS WERE EMPLOYED BY RESPONDENT FOR DAYLIGHT SERVICE, AND THAT THIS

SERVICE WAS EXTENDED INTO THE NIGHT BY REASON OF WHICH PETITIONERS WERE EMPLOYED FOR A WORK-WEEK BEYOND THE MAXIMUM HOURS PROVIDED BY SECTION 7 (a) OF THE ACT, PETITIONERS ARE ENTITLED TO OVERTIME PAY CALCULATED AT ONE AND ONE-HALF TIMES THE REGULAR RATE OF PAY WHICH THEY RECEIVED FOR THE FORTY-FOUR AND LATER FORTY HOURS DAYLIGHT WORK.

Neither the District Court nor the Circuit Court gave any consideration to the question of the means of computing the "regular rate of pay" under the facts in this case, leaving that portion of the case undecided since by finding in favor of the respondent it became unnecessary to consider the rate of pay. The District Court in its opinion said, "This holding eliminates the necessity of passing on a number of other questions some of them novel and interesting, among them, how the regular rate of pay of these men would have been arrived at, if I had allowed such call time as overtime."

Congress did not attempt to define the term "regular rate of pay" in the Act, but simply said in Section 7 (a) that overtime should be paid "at a rate not less than one and one half times the regular rate at which he is employed." However, this Court has had occasion to treat with the question of "regular rate of pay" as it arises under the Act in two instances:

Walling v. Belo Corp., 86 Law Ed. 1166 (U. S. S. C. July 8, 1942) and in *Overnight Motor Transporta-*

tion Co v. Missel, 86 Law Ed. 1159 (U. S. S. C. July 8, 1942). However, in neither of these cases was the method of payment similar to the case at bar. In the *Belo case* there existed a written contract between the employer and employees which provided for a regular rate of pay for a certain number of hours, which the employer paid regularly even though the employee did not spend the required number of hours on the job. In the *Missel case* employees were paid a regular weekly salary which never varied with the number of hours worked. In the instant case the employees were paid a weekly salary, but in the event they worked on their daylight jobs in excess of the maximum hours provided by [redacted] Act they were paid for the excess hours of daylight work at time and one half the regular rate of pay based upon their salary ($27.00 to $29.00) divided by the maximum number of hours provided for by the Act, (R. 47), or 68 cents per hour, (R. 56), and for holiday-daytime work they were paid double time for those hours. (R. 47). And in the event of absence from a day's daylight work, petitioners were "docked" at the rate of $5.40 ($27.00 ÷ 5) until January 1, 1940, and thereafter 64 cents per hour, if the absence involved less than a full day (R. 43). The record is silent on the question of what occured in the event of absence from night duty, but it is contended by petitioners that since all of the evidence indicates that the salary of $27.00 to $29.00 was treated as pay for their daylight duties, and since the respondent has consistently taken the position that petitioners were not "working at night" and the further contention of the respondent that petitioners were paid a legal wage for all

their daylight work—then the conclusion must be that petitioners were paid nothing for their nights; and if the Court finds that the time spent in the fire hall was "work" within the meaning of the Act the petitioners are entitled under the Act to receive one and one-half times their regular rate of pay for all hours worked each week in excess of the hours spent in the daylight service. To summarize: Since petitioners have worked 102 hours, with some variations, and have been paid for only 40 to 44 hours, they are entitled to overtime pay for the 58 to 62 hours (the exact number of hours to be determined by the exact difference in hours worked each week by each petitioner), and the regular rate of pay is the hourly rate arrived at by dividing the weekly salary by the hours worked on daytime jobs each week during the period of employment of each petitioner, as established by the facts presented in the record. The schedule of pay as set forth in the stipulation of facts reveals that for the 40 to 44 hours worked in the elevators or on general fire hall duties the petitioners were paid $27.00 to $29.00 per week (T. 46, 47, 54, 55.) The record further indicates that for any fire or emergency calls answered at night the petitioners were paid 50 cents and later 64 cents for each alarm answered. The record is silent on any other payment of wages. Your petitioners take the position that they were never paid anything for their services in staying at the fire hall at night, except the amounts they received when they answered an alarm, which was very rare, being only 29 times for all seven petitioners in more than two years. Indeed in its original answer the respondent said "Defendant denies that

plaintiff was employed during any workweek involved herein for a number of hours greater than the number of hours spent acting as an elevator operator, and in answering fire alarms, and defendant says that it has heretofore paid plaintiff for all of such work at a lawful rate. * * *"

The petitioners' position that they have been compensated for only their 40 to 44 hours daylight work, and for the hours they spent in answering alarms is supported by the following findings of the trial court:

> "(2) Plaintiffs have been compensated at a lawful rate for all of their work in general fire hall duties, such as keeping in proper condition the plant fire-fighting equipment such as hose, sprinkler system, extinguishers and barrels, and as elevator operators and relief men."

Although, as has been pointed out, the facts in the *Bolo* and *Missel cases* (supra) are not analogous to the case at bar the Eighth Circuit Court has considered an almost identical case in facts presented, in *Sklar Oil Corp. v. Thompson*, 126 Fed. (2d) 872. In that case it was shown that the employee was paid a regular salary for a specified number of hours, but that the employee worked additional hours for which he received no pay. In treating with the employer's contention that the salary should be extended to include all hours worked in order to determine what the regular hourly rate was the Court said:

> "An employer cannot thus flee to the courts for protection to reduce the liability he may have incurred by refusing to recognize certain hours spent by his employees in service as work. . . . Its (Appellant, Sklar Oil Corporation) only con-

> tention in this regard is that the flat salary employment precludes computation at an hourly rate. This contention, of course, falls away in the presence of appellant's own records."

Though the facts in the instant case are not analogous to the facts as they relate to the matter of "rate of pay" in the case of *Mumpus v. Continental Baking Co.*, 124 Fed. (2d) 548, the expression given by the Sixth Circuit Court in discussing the determination of "regular rate of pay" said:

> "To lessen the regular rate of pay in interpretation, where in fact it was a rate established, would defeat this section (Section 7) of the Act."

Indeed that is precisely what the respondent seeks to do in its answer, and in the brief which it filed in the Circuit Court. It contends first that there was no overtime work and that the petitioners have been paid the lawful wage for all of their work, then in the alternative says that in the event the courts should determine that the petitioners did work overtime, the wages paid should be construed to be payment for all hours worked. Such a contention fails in the face of the employment practice of paying 68 cents per hour for work in excess of the maximum for daylight work in any one workweek. Though there was no written contract establishing a set hourly rate of pay, as there was in the *Walling v. Belo case*, supra, there was an established practice which was as effective as is a written contract. The regular rate in this case was $27.00 to $29.00 per week for the maximum number of hours permitted under the terms of the Act. Overtime payment is due at time and one-half this rate of pay.

The respondent in its argument in the Circuit Court emphasized the large sum of money which the petitioners seek to recover by virtue of their overtime work. However, the amount itself would not be so great, if the petitioners were not entitled to receive in addition to the overtime pay due them, an equal amount as liquidated damages and a reasonable amount as attorney fees. It is well settled that, in the event of any recovery, petitioners are entitled to these additional amounts. See *Overnight Motor Transportation Company v. Missel*, supra.

SUMMARY AND CONCLUSION

Since the Act itself does not define the term "work," and says only that "employ means to suffer or permit to work," we may look to the general meaning of those terms in the English Language in an endeavor to assay what Congress intended when it said, "No employer shall employ * * *." It has been pointed out that one of the purposes of the Act was to reduce unemployment by making it more economical for employers to work their employees shorter hours, than to pay time and one-half for overtime and thus to make it economical to engage new employees rather than work old employees long hours. That being the purpose, it would appear that Congress had in mind just such situations as the one presented by the case at bar, for here definitely was a situation which, had the respondent recognized the duty performed by the petitioners as "work" or as being within the term "employ," it would have resulted in a more economical operation to hire new employees rather than to keep your petitioners some 60 hours overtime each week.

Your petitioners have shown that the weight of authority supports their position to the effect that the hours spent at night in the respondent's fire hall were hours within the meaning of the term "employ" as used in the Act. The facts in the case are such that only one logical conclusion can be reached for the computation of "regular rate of pay"; i. e., the weekly salary of $27.00 or $29.00 divided by the maximum number of hours provided by the Act for each particular year.

Authority has been cited showing that your petitioners were entitled to an additional amount equal to the amount of their overtime as liquidated damages, and are entitled to a reasonable attorney's fee.

For the reasons stated, we respectfully submit that the judgment of the Circuit Court of Appeals should be reversed, and that the Court be instructed to find for the petitioners.

Respectfully submitted,

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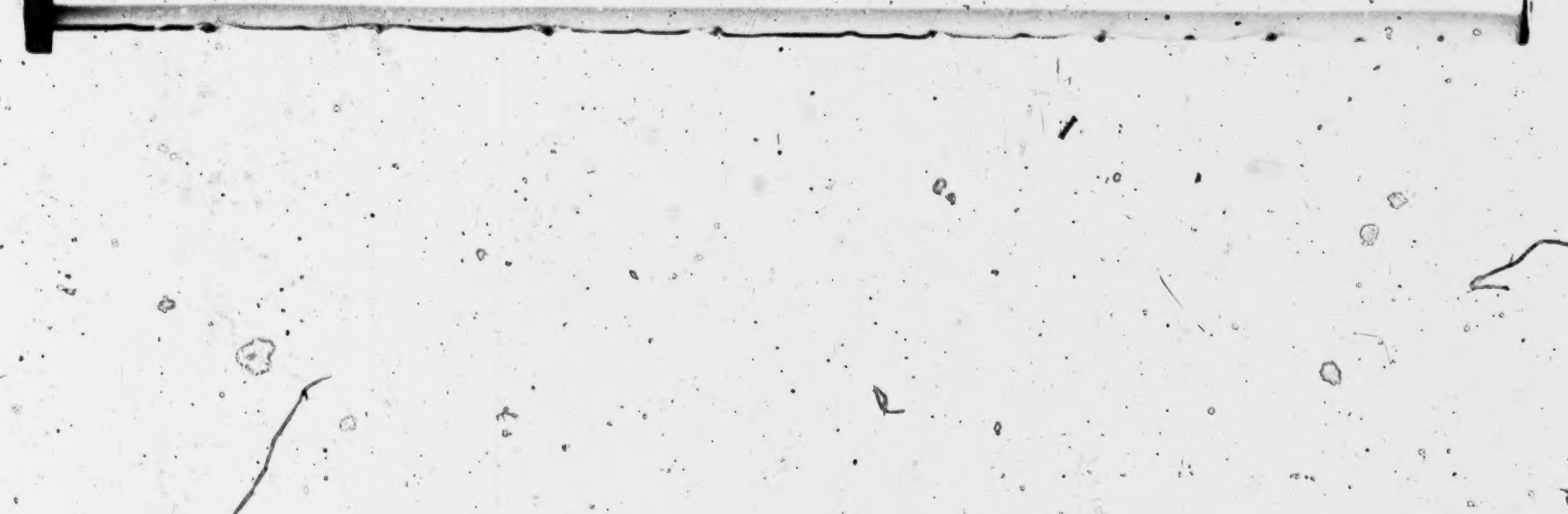

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 12

JIM SKIDMORE ET AL, *Petitioners*

v.

SWIFT & COMPANY, *Respondent*

RESPONDENT'S BRIEF

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NO. 12

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RESPONDENT'S BRIEF

PART I. REPLY TO PETITIONERS' BRIEF.

OPINIONS BELOW

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Skidmore v. Swift & Company (CCA 5th Cir.) 136 Fed. (2d) 112 (R. 62).

STATEMENT OF CASE

Petitioners' statement is inaccurate in the following respects:

On Page 3 of the Petition for Certiorari they say it was stipulated that they worked during the daytime 44 hours per week, later 42 hours, and then 40, as elevator operators and in general fire prevention work. This is incorrect in that the hours fluctuated from week to week. (R. 46, 54).

They say that "In addition to this day work" they spent 3½ to 4 nights per week in the fire hall, with no particular duties to perform except answering alarms, which were very few. They then state, "The stipulation shows that the plaintiffs were paid $27.00 to $29.00 per week for their regular work." (Pet. 3). Respondent feels that this contention is not in accord with the agreed statement of facts because, for the very purpose of preventing such erroneous interpretation, it was distinctly provided in an addendum to the agreed statement of facts, that—

> "Nothing in the agreement is to be construed or argued as an agreement that any part of the wages or salaries paid plaintiffs represented pay for any particular part of their work *or* time spent in the fire hall, these matters being left for the determination of the court." (R. 56).

Respondent believes that the following statement from the agreed record will enable the court to grasp more clearly the essential and undisputed facts:

Petitioners Dennis and Millican were engaged exclusively in general fire hall duties, consisting of keeping in proper condition the plant fire-fighting equipment, such as sprinkler system, hose, extinguishers and barrels. The other Petitioners operated elevators in the plant and acted as relief men for Dennis and Millican in general fire hall duties. (R. 36).

Petitioners were employed under oral agreements whereby, in addition to their daytime work, they agreed and were required to stay in the fire hall or within hailing distance, subject to call in the event of fire or other casualty, but they were not required to perform any specific tasks except in answering

alarms, for which they were paid at first fifty cents and later sixty-four cents for each alarm. (R. 37).

"Plaintiffs (Petitioners) had *no work or duties to perform* during the time they were required to remain in or within hailing distance of the fire hall, except in answering certain fire alarms, as shown in the schedules hereinafter appearing, and had ample time for sleeping." (R. 37).

No actual fires occurred (R. 43, 53). The time required for answering alarms, caused for instance by a rusty plug or leak in the sprinkler system, in which event an alarm automatically sounded, was generally about 15 to 30 minutes, occasionally as much as one hour. (R. 43).

During the two and one-half years involved, one of the men, Millican, answered no alarms whatever; two, an alarm about every three months; one, an alarm once each year and three months; two, only one alarm during the entire two and one-half years; and another, an alarm about once every five months. (R. 31, 32).

They were each paid a weekly salary running from $27.00 to $29.00 per week, and in addition, for answering fire alarms, the sum of fifty cents for each alarm until January 1, 1940, and thereafter sixty-four cents for each alarm. (R. 32).

They worked in the plant as aforesaid from 7:30 A. M. to 3:30 P. M. five days a week, except for a lunch period of thirty minutes each day. At other times they stayed in or close by the fire hall, except that in addition to the lunch period, they had one

hour each morning, two hours each night, two whole days and from 2 to 3½ nights each week for meals, relaxation and entirely private pursuits, being free during these times to come and go as they pleased. (R. 32, Pet. 3).

The brick fire hall maintained by Respondent was equipped with sleeping quarters, steam-heated and air-conditioned rooms, a pool table, domino table and radio for the convenience and recreation of Petitioners, who had ample time for sleeping in the fire hall and occupied their time during the hours they were required to remain there in talking, reading, bathing, dressing, shaving, sleeping, playing pool, dominos, checkers and other games and listening to the radio. (R. 32, 37).

SUMMARY OF ARGUMENT

Petitioners and Respondent entered into an oral contract. Their own interpretation of its terms over a period of years, that time spent in the fire hall did not constitute work, is of controlling weight, provided statute not violated. Recovery not permissible under rule of *Tennessee Coal Co. Case*, 321 U. S. 590, which is only decision by Supreme Court on work hours under Fair Labor Standards Act.

Skidmore Case meets every test applied by majority, concurring, and dissenting opinions in Tennessee Coal Company Case, viz: No indicia of work; no direction, control or supervision of conduct; no exacting and dangerous conditions involving physical and mental exertion; no sub-standard conditions of industry or detriment to health and welfare; fire

hall equipped for convenience and recreation of Petitioners, who had as much time for private pursuits as average citizen; Wage and Hour Administrator's interpretation should be followed; reasonable provisions of contract governing computation of work hours will be upheld; facts leave no uncertainty that time spent in fire hall was not work; what constitutes working time is question of fact; trial court found, affirmed by Circuit Court of Appeals, that time spent in fire hall did not constitute work for which overtime compensation due; concurrent findings of fact of two courts below are final in Supreme Court, absent very exceptional showing of error; affirmance demanded.

Rule of affirmance so strong that Supreme Court in Tennessee Coal Case affirmed findings that travel time constituted work, and that time spent on surface did not, although it is clear that serious question of fact was raised that surface time was just as "required" and "necessary" as travel time.

The Act was not intended to turn into work that which was not work, or not so understood at the time of passage. Courts are not permitted to designate as work some activity which neither employer nor employee ever regarded as work.

Weight of authorities, both Federal and State, is against Petitioners. The courts have been influenced by and have adopted the Administrator's interpretation of the Act.

Injustice would be perpetrated by allowing recovery: Petitioners would obtain no permanent benefit, because present arrangement could not be continued

on account of obvious economic disadvantages; no benefit would accrue to employees generally, because controveries arise only in unusual cases; some industries, notably oil, will receive a serious blow.

Armour & Company's briefs and argument in Armour, v. Wantock, et al, now pending in Supreme Court, applicable on point time spent in fire hall did not constitute working hours. Wantock Case distinguished as to some of facts.

ARGUMENT

I.

Under the agreed facts, Petitioners had daytime jobs as elevator operators, relief men and firemen, and agreed and were required to stay 3½ nights a week in or near their employer's fire hall, during which time they had no work or duties to perform, except answering fire alarms, which were so infrequent and required such little time as to be almost insignificant, and for which they were paid at a lawful rate. They were free to use and did use their time spent in the fire hall for talking, reading, bathing, dressing, shaving, sleeping, playing games, listening to the radio and such purposes as they desired. At all times they had a normal night's sleep, ample time for meals and relaxation, and for entirely private pursuits. Such time, so spent in the fire hall, does not constitute hours of work, for which they should receive overtime compensation under the Fair Labor Standards Act.

Of course, it cannot be even plausibly argued that time so spent constitutes "work," consonant with common acceptance and general understanding of the

meaning of such term. Petitioners' case therefore depends upon a construction of the Fair Labor Standards Act that because they were subject to calls for the performance of trifling tasks, which were so infrequent as to be insignificant, such hours so spent must be considered as "work" hours, for which overtime compensation is due them.

Respondent submits that such construction would be a forced, strained, unreasonable and unjust one, and that the decision of the two courts below, based on fact findings amply supported by the evidence, should be affirmed for the following reasons:

1. Section 7 (a) of the Fair Labor Standards Act (29 U. S. C. A. Sec. 207) provides substantially:

> "No employer shall employ any of his employees * * * for a work-week longer than (44, 42 or 40) hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 3 (g) of the Act (U. S. C. A. Title 29, Section 203). provides:

> "'Employ' includes to suffer or permit to work."

It is obvious that Congress did not define the word "employ," but used it in its generally understood and commonly accepted meaning as related to the term "work," and then stated that it includes suffering or permitting a person to work. That is not a definition, but a mere statement of what the term includes. The statute is clear, definite and

specific. It means that "No employer shall employ a person to work during any one week longer than forty hours, unless such person is paid overtime."

As said in 2 *Labor Law Service*, paragraph 23652, section 23676—"Section 3 (g) by broadening the meaning of employment to include suffering or permitting a person to work, precludes defenses based on alleged voluntary and unauthorized performance of overtime work or gratuitously rendered service, defenses which were raised successfully in the early years of maximum hour regulation," and in *Maddox v. Jones*, 5 L. C. 60916, and *Walling v. American Needlecrafts, Inc.*, 6 L. C. 61212, it was made clear that the purpose of Section 3 (g) was to protect actual employees from being classified as independent contractors.

It is likewise obvious that Congress did not define the terms "work" or "work week," and therefore, what constitutes working time is a question of fact depending upon the particular circumstances and is a matter for determination by the courts. In doubtful cases, the issue must be determined in accordance with common sense and the general concept of work or employment. *Tennessee Coal Co. v Muscoda Local* (CCA) 135 Fed. (2d), 320, syllabi 1, 2; or, as stated by the Supreme Court in affirming the case:

> Congressional intent was "To guarantee their regular or overtime compensation for all *actual* work or employment. Congress here was referring to work or employment, * * as those terms are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pur-

sued necessarily and primarily for the benefit of the employer and his business." 321 U. S. 590, 598.

2. Petitioners were entirely satisfied with the arrangement, because they voluntarily continued it for years. To stress the thought that Petitioners were "required" to stay in the fire hall is to over-emphasize. They stipulate they "agreed" to do so, and the fact that they stayed there for years on end, without complaint, speaks for itself. Moreover, there is no evidence in the record that they could not have voluntarily discontinued staying in the fire hall and still have kept their daytime jobs. A fair inference is that they stayed there because they wanted to do so on account of its various advantages.

The situation may be likened to the one which exists between a private individual and his chauffeur or yardman, who agrees and is required to stay on the premises at night, to assure his being ready for work promptly in the morning or for sense of security or other good reasons. Under similar circumstances, the Wage and Hour Administrator has ruled that where the employee has ample time for meals, relaxation, entirely private pursuits and a normal night's sleep, reasonable periods of time being agreed upon for such activities, such facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours will be accepted (Interpretative Bulletin No. 13, Par. 6, 7; *2 Labor Law Service*, P. 32402, Par. 32113). The Courts have almost invariably followed this ruling, as will be later shown.

The case at bar, where the parties agreed upon reasonable periods of time to stay in the fire hall and reasonable periods for meals, relaxation, private pursuits and sleep, being as much as or more than those enjoyed by the average citizen, comes directly within the scope of the rule announced by the Administrator and adopted by the Courts.

The undisputed facts are that the parties made a mutually agreeable and wholly satisfactory contract, whereby Swift offered Petitioners a pleasant place in which to live and pass their idle hours, far surpassing such surroundings and comforts as they individually might be able to enjoy. The arrangement was under circumstances not more confining than those of the average citizen and within the spirit and purpose of the Act as interpreted by the Wage and Hour Administrator and the great majority of the courts dealing with similar situations. It is submitted that such a contract does not and ought not to be held to violate the provisions of the Fair Labor Standards Act.

3. No question of custom and practice is involved. To the contrary, it was stipulated that the parties had an oral contract. Their own interpretation of its terms over a period of years that time spent in or near the fire hall did not constitute work, is of controlling weight. *Lone Star Gas Co. v. X-Ray Gas Company* (Sup. Ct. Tex., 1942) 164 S. W. (2d) 504, 508.)

4. Swift did not consider that this arrangement which had existed for years involved working hours in violation of the Act. It cannot be conceived that

Swift would otherwise lay itself open to the enormous liability asserted in this case by continuing such an arrangement.

5. Nor did Petitioners consider time spent in the fire hall as working hours, because they accepted their regular weekly salaries for two and one-half years (October 24, 1938 to April 19, 1941) without complaint so far as the record shows. It was not until after this suit was filed, years after the effective date of the Act, that any claim was made for alleged unpaid overtime. Certainly, if Petitioners had any idea that they were actually working, as that term is generally and commonly used and understood, during the time they spent in the fire hall, or that they were working more than the permissible hours under the Act, they would and should have called their employer's attention to it at the time. They did not do this however, which immediately suggests the possibility that their present claims are nothing more than an after-thought.

Petitioners admit in their pleadings filed June 20, 1941, that they were still employed by Swift and still staying in the fire hall. (R. 15). Moreover, they filed another suit in 1943, seeking overtime compensation from April, 1941, to May, 1943, alleging that in 1943 they were still staying in the fire hall under the same arrangement. Evidently they did not consider it a hardship.

This subsequent suit was styled, "*Raymond Roark, et al v. Swift & Company*, U. S. District Court for Northern District of Texas, Civil Action No. 521." The facts were not stipulated, but evidence was of-

fered directly by plaintiffs themselves. Upon trial, the court granted defendant's motion for an instructed verdict, and January 18, 1944, gave peremptory instructions to the jury, which were later reduced to writing and constitute a part of the court record in that cause. Further light is shed on the issue involved here by quotations from such instructions, as follows:

> "Narrowed some, the question is, whether, under the undisputed evidence, the hours spent by plaintiffs at night in sleeping, shaving, or performing like personal duties for themselves, or playing pool, dominoes, or in reading, in defendant's fire hall, constitute hours of work under this law, and must be counted, in arriving at their weekly hours.
>
> "The plaintiffs request the court to submit this one issue, and this one issue really embodies the plaintiffs' view as to what the only issue is. Also what the law is that controls here. The special issue they want submitted to you reads as follows:
>
> 'Now come the plaintiffs and request that the following issues be submitted to the jury:
>
> '1. From the evidence presented, what number of weeks did each of the plaintiffs work for the defendant and how many hours in excess of 40 hours per week did they work during each of these weeks, during the period from April 1, 1941, to June 1, 1943. In making this determination, you shall exclude all hours which you find plaintiffs had for normal sleeping and entirely personal pursuits such as eating, bathing, shaving, etc., but you shall include all time which you find plaintiffs were performing some duty or service for the defendant.

'The jury may make its finding by filling in the following schedule.'

"Now you gentlemen have heard a good deal about the Skidmore case; that there was a case tried in this Court so styled; that the Skidmore case had the same plaintiffs and the same defendant as this one, with the exception that Skidmore is not a party here. They filed that original suit prior to March, 1941, under this statute to recover overtime for a period beginning in 1940 and running into 1941.

"That suit was tried by me under a stipulation as to the facts. The stipulation was not so elaborate. In other words, it did not cover in detail so much as to how plaintiffs' night hours were spent. In substance, the stipulation was, as I view it, the same as the evidence here, as to whether what the men did at night was work. I held against plaintiffs in that case; that the defendant was not liable; that playing dominoes, billiards, reading, sleeping, etc., was not work under this Act and under the circumstances of that particular case. That was appealed to the Circuit Court of Appeals at New Orleans, and they agreed with me about it."

"In that opinion they expressly held that certainly plaintiffs were not entitled to recover overtime pay for sleeping. Now, since this case was filed, plaintiffs have eliminated their claim that they were working while sleeping. Though they originally filed for it, they later voluntarily eliminated that.

"Now were this case submitted to you on the theory submitted by plaintiffs' counsel, I don't see how you could ever reach any conclusion under this evidence that such night hours as plaintiffs spent at the fire hall were in work. Plain-

tiffs' submitted charge would direct you to exclude all hours plaintiffs spent in normal sleeping and entirely personal pursuits, such as eating, bathing, shaving, and so forth. Well, I don't know what 'so forth' could cover, unless it would cover dominoes, reading and pool, because they must be included along with all other personal pursuits. They are purely personal pursuits. Playing pool is no service to Swift & Company. That is purely personal just as much so as sleeping; just as much so as shaving and eating. Personal, because it relates solely to the employee. They may say they could not work for Swift unless they slept some. Nor could they live unless they slept. But the submitted charge would have you include all the night time you found was of service to Swift. Now, I am not able to see, under this evidence, how you could find anything they did was of service to Swift, other than answering those alarms, for which they were paid. Of course, the money they were paid for such calls was infinitesimal because the calls they had were infinitesimal.

"The evidence here shows that the fire hall was quite a nice place of amusement. It wasn't home, but the law holds that you cannot claim wages because you are required to remain away from home. That hall was so attractive that it became almost a Club, where forty to fifty, and I believe one man said sometimes one hundred, men would be up there. Apparently it got so popular that Swift & Company had to stop it. At least I got that from the evidence that they cannot now congregate up there. It is plain from the evidence that it became a very popular Club.

"They do not seek regular pay for that; they want time and a half. Assume they got a dollar.

they want one and a half for those hours they played dominoes and checkers, and I would not be surprised if a little poker once in awhile. Some other court has to hold that. I am not going to make such a holding. Some higher court has to tell me that is the law before I do. I don't believe any of them are going to tell me that.

"I know this, it will be an outrage for a court to set up a system by which men can come in and get thousands and thousands of dollars for nothing. I don't know how much it would be with the sleeping time out, but it would still run into thousands that would be put in their pockets out of Swift & Company's pocket, for their games and pleasure up there at night.

"I hope we will never have such a system of laws prevailing in this country, or become so blind to justice or to common honesty as to look on such things as right."

Since both parties construed the contract as not involving working hours, such construction ordinarily controls. On this phase of the case, the Supreme Court of Texas said in 1942:

"If there is any doubt as to the meaning of a contract like the one before us, the courts may consider the interpretation placed upon it by the parties themselves. In this instance, the acts of the parties themselves indicated the construction they mutually placed upon the contract at the time, including the acts done in its performance, and same is entitled to great if not controlling weight. Courts will generally follow the interpretation of the parties to a doubtful contract. The practical construction placed upon a contract by the parties themselves constitutes the highest evidence of their intention that whatever was

done by them in the performance of the contract was done under its terms as they understood and intended same should be done." (Citing cases and 12 Amer. Jur. p. 787, 249, where many Federal cases decided by the Circuit Court of Appeals and the Supreme Court may be found.) Lone Star Gas Co. v. X-Ray Gas Co. (Sup. Ct. Tex.), 164 S. W. (2d) 504, 508.

6. We are told, however, that—

"Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." (Citing cases).

"This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible. Nor are we concerned here with the effect that custom and contract may have in borderline cases, where the other facts give rise to serious doubts as to whether certain activity or none-activity constitutes work or employment. It is sufficient in this case that the facts relating to underground travel in iron ore mines leave no uncertainty as to its character as work." Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590; Op. 602, 603.

Necessarily this rule must be considered in connection with the further statement of the Court interpreting the Act, that—

"Congress here was referring to work or employment * * * * as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (Opinion, 321 U. S. 598).

Respondent submits that under the above interpretation of the Act, it is clear that time spent in the fire hall by Petitioners should not be counted as hours of work, because:

(a) The friendly and mutually agreeable arrangement in the case at bar does not constitute work or employment, as those terms are commonly used;

(b) Staying in the fire hall was not controlled to any extent or degree by Swift;

(c) Staying in the fire hall was not "required" by Swift in the ordinary sense and meaning of the term "require." Petitioners agreed to stay there, were glad to do it, and the record fails to show that they could not have voluntarily stopped if they so desired. In other words, the record fails to show that staying in the fire hall was a necessary complement to retaining their daytime jobs.

(d) Staying in the fire hall was not pursued necessarily and primarily for the benefit of Swift. It was a favor extended and a favor received.

(e) The provision of the contract indisputably shown by the construction placed upon it by the parties, that time spent in the fire hall did not constitute working hours, was reasonable.

(f) This is not a borderline case, but if it were, then certainly the facts give rise to serious doubts as to whether time spent in the fire hall under the particular arrangement in this case, constituted work or employment.

(g) Such doubts are resolved by the construction of the parties, the interpretation of sim-

ilar contracts by the Wage and Hour Administrator, the adoption by the courts of such interpretation, the decisions of the courts, the intent and purpose of the Fair Labor Standards Act, the common sense construction demanded, and by due regard of what is fair not only to the employee, but also the employer. Finally, they are resolved by the fact findings of the trial court, affirmed by the Circuit Court of Appeals.

7. The Skidmore case meets every test applied by the majority opinion, the two concurring opinions and the dissenting opinion in *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, towit:

Majority Opinion

(a) The District Court found that travel time "bears in a substantial degree every indicia of work-time; supervision by the employer, physical and mental exertion, activity necessary to be performed for the employer's benefit, and conditions peculiar to the occupation of mining." (321 U. S. 593). The Circuit Court affirmed these findings of fact. None of these indicia exists in the *Skidmore case*, and the District Court so found. Its findings were affirmed by the Circuit Court of Appeals.

(b) The question in the *Tennessee Coal Case* was said to be whether the miners were at work while engaged in underground travel, which they were obliged to perform *under the direction* of the Company. (Opinion 593). The opinion then twice stresses the point of direct control and supervision by the employer, saying:

"The operation of the skips and man trips is under the *strict control and supervision* of the Petitioners at all times; loading and unloading are *supervised;* speed of trips *regulated;* conduct of miners *prescribed.*" (Op. 595).

"This compulsory travel * * * is at all times under * * *strict control and supervision.*" (Op. 598).

In the Skidmore Case, time spent in the fire hall was not under Swift's direction, control or supervision. Swift could make no demands and did not attempt to do so.

(c) The exacting and dangerous conditions from and to the portal, involving continuous physical and mental exertion as well as hazards to life and limb in the Coal Case, did not exist in the Skidmore case.

(d) Travel was not primarily undertaken for the convenience of the miners in the Coal Case (Op. 599), whereas, in the Skidmore case it appears that "The fire hall building was equipped with sleeping quarters, etc., *for the convenience and recreation* of its occupants." (R. 37).

(e) In the Coal Case, the Supreme Court adopted the conclusion of the Administrator of the Wage and Hour Division, that underground travel in mines is work. (Op. 600). The conclusions of the Administrator (paragraphs 6 and 7 of Interpretative Bulletin No. 13, found in *2 Labor Law Service*, Sec. 32113, pp. 32401 et seq.) that time spent by employees of similar nature to time spent in the fire hall by Petitioners, does not constitute working hours, should therefore be adopted. The Administrator's interpretation is as follows:

"6. In a few occupations periods of inactivity need not be considered as hours worked, even though the employee is subject to call. The answer will generally depend upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i. e., the frequency with which the employee is called upon to engage in work.

"In these cases, the nature of the employee's work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc.

"7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty, but are subject to call at any time in the event of an emergency.

"The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day.

"In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division."

(f) In the *Coal Case*, the Supreme Court said that reasonable provisions of contracts governing the computation of work hours, would be upheld. (Op. 603.) In the *Skidmore case*, the construction of the contract by the parties thereto that time spent in the fire hall did not constitute work hours, is reasonable.

(g) In the *Coal Case*, the Supreme Court said that the facts relating to travel time leave no uncertainty as to their character as work. (Op. 603). In the *Skidmore Case*, the facts leave no uncertainty that time spent in the fire hall was not work.

First Concurring Opinion

The term "work week" has no technical meaning. As used in the Act, it carries merely the meaning of common understanding. In controverted cases, the facts are to be found by a jury or court. Where the record shows a judgment of the District Court, affirmed by the Circuit Court of Appeals, based on findings with ample evidence to support them, "affirmance by this court is therefore demanded." (321 U. S., Op. 604).

Second Concurring Opinion

"A seasoned and wise rule of this court makes concurrent findings of two courts below final here, in the absence of very exceptional showing of error." (321 U. S., Op. 605).

Dissenting Opinion

This opinion in the Coal case is to the effect that the trial court failed to find sufficient relevant and material facts to support the final finding that travel time should be considered as hours worked. In addition, the dissenting opinion points out that "The Act was not intended to turn into work that which was not work, or not so understood at the time of its passage. Courts are not permitted to designate as work some activity of an employee which neither employer nor employee had ever regarded as work, merely because the court thought that he ought to be compensated." (321 U. S. 617).

8. What constitutes working time is a question of fact. (*Tennessee Coal Co. v. Muscoda Local* (CCA) 135 Fed. (2d), 320, 322; 321 U. S. 590, 598).

It was stipulated in the Skidmore case that—

> "Petitioners agreed to remain in the fire hall and stay at or within hailing distance subject to call in the event of fire or other casualty, *but were not required to perform any specific tasks during these periods of time, except in answering alarms.*" (R. 37). *They were not required to perform any work, and had no duties whatever except in the aforesaid emergency calls.*" (R. 42, 51).

> "During the entire period of time involved herein, plaintiffs (Petitioners) *had no work or duties to perform* during the time they were required to remain in or within hailing distance of the fire hall, except in answering certain fire alarms, as shown in the schedules hereinafter appearing, and had ample time for sleeping." (R. 37).

The trial court's findings of fact were as follows:

Petitioners *had no work or duties to perform* during the time they were required to remain in or within hailing distance of the fire hall, except in answering fire alarms, which were infrequent and usually required only 15 to 30 minutes time of one or two men to answer. (R. 31).

Petitioners were paid weekly salaries, and in addition they were paid for answering fire alarms the sum of fifty cents for each alarm until January 1, 1940, and thereafter sixty-four cents for each alarm. (R. 32).

The time Petitioners spent in the fire hall subject to call to answer fire alarms, does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the courts. (R. 33).

The Circuit Court of Appeals affirmed the trial court's findings. (*Skidmore v. Swift & Co.* (CCA) 136 Fed. (2d), 112).

The findings of the two courts below that time spent in the fire hall does not constitute hours worked are not clearly erroneous. To the contrary, they are based on the Administrator's interpretation of the Act, the authority of other decisions, state and fed-

eral, in similar cases, on common sense and reason, and accord the Act a construction which is just and fair to both employer and employee under the entire facts and circumstances of the case. The judgment should, therefore, be affirmed.

Concurrent findings of the two courts below are final in the absence of a very exceptional showing of error. Affirmance is demanded. (*Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, Op. 598; concurring opinions, 604, 605).

9. In the Coal Case, it is clear that the findings of the Circuit Court of Appeals and the Supreme Court that time spent on the surface by the miners was just as "required" and "necessary" for their work as travel time, or at least, that a serious question of fact was raised, viz:

> "*Time was consumed* each week by the employees in checking in and obtaining and returning lamps, carbide and tools on the surface—(opinion Circuit Court 135 Fed. 2d, 320, bottom 321)—the workers were "*required* to deposit a metal disc at the tally house when arriving for work and pick it up again at the end of the shaft." (P. 323).

> "The miners arriving on Company property went to the tally house, checked in and hung up individual brass checks on a tally or check-in board. This was *for the benefit of the officials of the employer* to tell at a glance who had reported for work, etc., in order to enable the Company to fill vacancies and issue *necessary* instructions to the head miners and crews. Each miner rents a lamp for the day and buys a can of carbide for underground illumination purposes

(clearly necessary for the work). Many stop at the tool house to pick up supplies and tools '*necessary* for their work.' They were then *required* to report to the loading platform and *await* their turn to ride down the shafts. (Tennessee Coal Co. Case, 321 U. S. 590, Op. 594).

The two courts below found travel time to be working time, but the Circuit Court excluded from the work week the time spent in activities at the surface. In this state of the record, the Supreme Court accepted the findings that travel time constituted work, and that time spent on the surface did not constitute work, and affirmed the case. Such action demonstrates the strength of the rule governing affirmance by the Supreme Court of fact findings in the lower courts. Consistency demands affirmance of the Skidmore case.

10. Not only has the Administrator of the Wage and Hour Division interpreted the Act to the effect that time claimed by Petitioners does not constitute working hours (Interpretative Bulletin No. 13, paragraphs 6 and 7, *2 Labor Law Service*, Sec. 32113, pages 32401, et seq.), but in practically all instances the trial and appellate courts, both Federal and State, have expressly relied upon and adopted this interpretation. Some of these cases are as follows:

The Oil Pumper Cases—

Cordell v. Wilcox (USDC Okla.) *5 Labor Cases 60807.*

Walling v. Pine (USDC WD Okla.) *6 Labor Cases 61189,*

Perry v. Livermore (TCA) 165 S.W. (2d), 782.

A telephone operator with telephone exchange in home, required to provide uninterrupted service 24

hours per day. *Munn v. Southwestern States Co.* (USDC ND Tex.) *5 Labor Cases 61011.*

A weighmaster for a metal mine required to be present when trucks passed night or day, in order that he might weigh them. *Carlton v. London Mines* (USDC Colo.) *4 Labor Cases 60699.*

A porter who did odd jobs in the plant during the daytime and agreed and was required to sleep at the premises at night. The fact that he had a home and stayed in it at various times was held not to be material. *Muldowney v. Seabery Elevator Co.* (USDC N. Y.) *4 Labor Cases 60517.*

The Firemen Cases—

Buckner v. Armour & Co., 53 Fed. Supp. 1022.

Skidmore v. Swift & Co., 53 Fed. Supp. 1020; affirmed 136 Fed. (2d) 112.

11. Shocking injustice would be perpetrated by allowing a recovery in this case. The court has perhaps already noted, or will note from reading the cited cases, how often the various courts have remarked on the exorbitant and unconscionable amounts demanded through claims for overtime alleged to be due under a sought interpretation of the Fair Labor Standards Act strictly and liberally in favor of the employee, although contracts and conditions of employment have been entered into innocently and in good faith, and the employees have worked under them during long periods of time, with no thought or suggestion of complaint or presenting claims for overtime. In other words, what they were doing simply did not come within their own common sense understanding of the term "work." Attention is again call-

ed to the rule that Petitioners' construction of the contract is entitled to great, if not controlling weight, and will generally be followed by the courts. *Lone Star Gas Co. v. X-Ray Gas Co.* (Sup. Ct. Tex.) 164 S. W. (2d) 504.

The situation is aggravated when it is realized that in many instances reliance has been placed by the employer on the interpretation given the Act by the Administrator of the Wage and Hour Division, and the approval by the courts of his interpretation.

In the case at bar, if petitioners prayers are granted, most of them would receive a tidy fortune of around $12,000.00 to $13,000.00 (plus attorney's fees), which, averaged with the pay they have already received, would give them salaries amounting to approximately five times the amounts they contracted to take for what they did. Specifically, they would receive about $625.00 per month for acting as elevator operators, relief men and firemen for approximately eight hours a day, five days a week, and sleeping in the fire hall 3½ nights a week under the circumstances shown.

The cost to Respondent of the claims of all Petitioners during the period of time involved, would amount to a total sum of $82,000.00. Subsequent liability to the date the matter is decided by the Supreme Court would involve a large sum. Multiply these sums by the number of plants Swift has in the United States, where similar systems are in effect, and the result is a staggering amount.

Take Petitioner Millican's case for example. He was paid a straight weekly salary of $28.50. He inspected firefighting equipment and kept it in good

condition for approximately eight hours a day, five days a week. He slept at the fire hall 3½ nights a week. At all times he had a normal night's sleep and ample time for meals, relaxation and entirely private pursuits, as much as or more than the average citizen. *He never answered a single alarm during the entire period of 2½ years for which he claims overtime compensation.*

Should he be paid $13,000.00, in addition to the $1,500.00 he received annually? If so, he would receive a total sum of $7,500.00 a year, instead of the $1,500.00 a year he agreed to take for what he did. He would thus be remunerated at the rate of about $625.00 per month.

If the court decides that Millican is not entitled to recover this exorbitant amount on the facts, then the other cases fall on both the facts and the principle thereby established.

12. Except for financial recovery for present liability, Petitioners cannot benefit by reversal because it is obvious that economic disadvantages incident to the present arrangement would prohibit its continuation.

13. No lasting benefit from a reversal would accrue to employees generally, because the conditions giving rise to controversy are unusual ones, such as are found in the oil industry, logging camps, etc. The oil industry will suffer a crippling blow if it has to pay its pumpers and leasemen the overtime rates demanded by such a decision. The result would be not only unfortunate, but wholly uncalled for, because it will be observed from reading the decisions that

in the oil pumper cases, as well as others cited, and in the Skidmore case, the employees in each and every instance had ample time for normal sleeping and attending to their private affairs, under arrangements which were practical, mutually satisfactory and advantageous to both parties. Moreover, no sub-standard conditions of industry or detriment to health and welfare exist.

14. In *Armour & Company v. Wantock et al*, now pending in the Supreme Court, the briefs and argument of Armour & Company on the point that time spent in the fire hall did not constitute working hours, are particularly applicable to the Skidmore Case.

15. However, the Wantock Case may be distinguished from the Skidmore Case as follows: The stipulation and oral testimony in the Wantock Case, in several places use the terms "work," "work shift," etc. In the beginning of the opinion by the Circuit Court of Appeals, 140 Fed. (2d) 356, it is stated that plaintiffs "were employed during one period on a 48-hour work shift." There is no such language in the Skidmore Case. To the contrary, in the Skidmore Case, Petitioners "*had no work or duties to perform*" during the time they stayed in or near the fire fire hall, except in answering certain fire alarms, and had ample time for sleeping. (R. 37). No hardships, substandard conditions or detriment to health and welfare of the employee were involved. The employee enjoyed as much or more freedom of activity as the average citizen.

Other facts distinguishing the Wantock Case are pointed out in Respondent Wantock's Brief in the

Circuit Court of Appeals, (page 15) and in the Opinion of the Circuit Court of Appeals in *Wantock et al v. Armour & Company*, 140 Fed (2d) 356, 357.

Discussion of Cases Cited by Petitioners On Hours Worked

Several cases are cited in the Petition for Writ of Certiorari, pp. 17 to 25, and in Petitioners' Brief, pp. 12, 13, as tending to support their point that time spent in or near the fire hall should be counted as hours of work. These decisions deal with night watchmen, policemen, messengers and others involving waiting time, subject to call time, and time traveling to work. The trial court correctly disposed of four of them (the only ones cited in the trial brief), by saying of course, it is often true that such time should be treated as work, but that such cases do not control here. (R. 28, 29). The ground of distinguishment is that they were different on the facts. All of the remaining cases cited by Petitioners, with one possible exception, fall in the same category, and it would be useless to discuss them in detail.

Respondent does not contest these holdings nor the Administrator's interpretation that in the case of messengers, chauffeurs and others, waiting time and other periods of inactivity should be considered hours worked. (Pet. 23). Petitioners' Argument (Pet. 8) that the decision of the court below exempts from the coverage of the Act a great body of employees such as night watchmen, maintenance men, firemen, etc., who have periods of inactivity and waiting, has therefore no force whatever, because it has absolutely no fact foundation.

Fleming v. Rex, 43 Fed. Supp. 950, is cited by Petitioners who assert, on page 14 of their Brief, that in *Fleming v. Rex*, "there was present the question of the hours devoted by the employee to sleeping, and the Court held that so long as an employee was charged with the responsibility of the operation of the pumps, that he was 'working' within the meaning of the Act." Such conclusion is wholly unjustified, as will be apparent from the Opinion which fails to reveal even a suggestion that sleeping time was involved in the decision.

This leaves *Johnson v. Dierks Lumber Co.*, (CCA 8th Cir.) 130 Fed. (2d) 115. The apparently favorable excerpt from this Opinion set forth in the Petition (P. 35), may be sound as an abstract proposition but it is not applicable here where the material facts are wholly different. Moreover, it is indicated in the majority opinion and clearly held in the concurring opinion of Chief Justice Stone that the hours spent by plaintiffs sleeping at night must be specifically excluded from hours of work, and should not be considered as overtime.

Johnson v. Dierks may be distinguished from the case at bar on the following grounds:

1. There was direct testimony in the record that plaintiffs worked sixteen hours a day regularly and twenty-four hours a day on Sundays and holidays. Their employment was considered in two parts, (1) hours of manual labor (2) hours when their sole duty was to act as watchmen to prevent vandalism, etc. The higher court held this evidence could not be disregarded.

2. Obviously, such positive duties requiring active mental and physical exertion were far different in character from those involved in the Skidmore Case.

3. During the day, from seven or eight o'clock in the morning until three in the afternoon, some of plaintiffs in the Johnson-Dierks Case were at liberty, but were required to be present all the remaining hours of the day and night. Since the case was reversed and remanded, it is not clear whether this free time would be excluded as hours of work.

4. Johnson v. Dierks is not in harmony with the interpretation placed on the Act by the Administrator, and the decisions rendered by various courts, particularly in the oil pumper and other cases cited herein.

II.

Petitioners are not entitled to recover overtime compensation for sleeping, dressing, bathing or similar personal affairs, and they failed in their proof to segregate such time from nonsleeping, pool, domino and radio-playing time, the burden of which was on them. Since they failed to meet such burden of proof and the trial court found against them, such finding must be upheld unless it is clearly erroneous, which it is not under the facts and circumstances of this case.

All of the decided cases on facts similar to those in the case at bar hold that Petitioners are not entitled to recover overtime compensation for sleeping, and while engaged in entirely personal affairs. (See cases cited this brief, pp. 25 and 26, see also opinion of Circuit Court of Appeals, R. top p. 64).

The Circuit Court of Appeals in this case pointed out that plaintiffs failed to segregate sleeping time and gave this failure to sustain the burden of proof as another reason for affirming the judgment. The court said, "Even if the plaintiffs had been entitled to recover for hours spent in boredom or waiting for bedtime or an alarm, the proof wholly fails to prove the actual hours spent either in sleeping, playing pool, dominoes, or radio, dressing, shaving, bathing, or in any of said enterprises, the burden of which was on the plaintiffs." (R. 64).

In an action for unpaid compensation and liquidated damages brought under the Fair Labor Standards Act of 1938, the burden is upon the plaintiff to establish by a preponderance of the evidence that overtime claimed actually constituted hours of work or labor, and the evidence to sustain this burden must be definite and certain. *Johnson v. Dierks Lumber & Coal Co.*, (C. C. A. 8th Cir.) 130 Fed. (2d) 115, 118, citing: *Jax Beer Co. v. Redfern*, 5 Cir., 124 Fed. (2d) 172, 175. *Cf. Carrol v. Green*, 92 U. S. 509, 513; *Stockwell v. United States*, 80 U. S. 531, 542; *United States v. Chamberlin*, 219 U. S. 250, 262; *Gale v. Union Bag & Paper Corp.*, (5th Cir.) 116 F. (2d) 27, 28.

In the case at bar, Petitioners wholly failed to meet such burden of proof, and the court having found against them, such finding must be upheld, unless it is clearly erroneous, which it is not under the facts and circumstances of this case. *Fleming v. A. H. Belo Corporation* (CCA 5th Cir.) 121 Fed. (2d), 207, opinion p. 210, citing *Federal Rules of Civil Procedure*, Rule 52, U. S. C. A. following Section 723 (c).

Respondent submits that this point is sound and should be sustained.

III.

A

Reply to Petitioners' Argument (Brief, 18) On Regular Rate of Pay

Respondent insists that time spent in the fire hall by Petitioners was not work, under the state of the record, but if this court should reach a contrary conclusion, then Respondent submits that the regular rate of pay should be calculated by dividing the weekly wage by the total number of hours actually worked.

Petitioners claim as hours of work, not only time spent as elevator operators, relief men and firemen, but also time in the fire hall. Nevertheless, they here advance the novel idea that "the regular rate of pay" on which overtime shall be based ought to be computed by *excluding* time in the fire hall, and *including only* time as elevator operators, relief men or firemen. They then divide the weekly salary by the hours so fixed as working hours in order to arrive at the "regular rate of pay."

In other words, they want *all* their salary allocated to only a *part* of their alleged work, and this part divided into the salary in order to calculate the "regular rate of pay," and they want this rate then to be applied to *all* of the hours claimed as work. Their evident purpose, of course, is to recover all that the court might allow them by the wildest stretch of the

imagination. They say they can have their cake and eat it too.

In support of this theory, Petitioners cite *Walling v. A. H. Belo Corporation*, 316 U. S. 624, and then say, "There is no disagreement between the rule laid down by the court in the Belo case, and that laid down the same day by the Supreme Court in *Overnight Transportation Co. v. Missell*, 316 U. S. 572." (Pet. 28).

Respondent is unable to follow this line of argument. There is neither agreement nor disagreement in the two rules, because they cover two different, separate, and distinct factual situations. The Supreme Court in the Belo Case specifically distinguished the Missell Case, and in discussing the guaranty contract used in the Belo Case, said:

> "It specifies a basic hourly rate of pay, and not less than one and one-half that rate for every hour of overtime worked beyond the maximum hours fixed by the Act. *It is entirely unlike the Missell case decided this day.* In the contract in that case, there is no stated hourly wage and no provision for overtime." (See opinion *Walling v. Belo Corporation*, 316 U. S. 624, 634).

The written wage contract in the Belo Case provided for a basic rate of 67 cents per hour for the first 44 hours each week, and not less than one and one-half times such basic rate for overtime, with a guaranty of a minimum of $40.00 per week. The court held that this agreed rate of 67 cents per hour was the "regular rate of pay."

In the Missell Case, there was an oral contract for a fixed weekly wage and fluctuating hours of work,

with no express agreement for overtime compensation. So, the Supreme Court held that the "regular rate of pay" is the quotient of the weekly wage divided by the total number of hours worked, and then stated:

> "*This contract differs from the one in Walling v. Belo Corporation*, post page 624, where the contract specified an hourly rate, and not less than time and one-half for overtime, with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty, where the hours worked at the contract rate exceeded that sum." (316 U. S. 572, Op. 581).

Petitioners cite two other cases in support of their theory on the "regular rate of pay"—*Sklar Oil Corporation v. Thompson* (CCA 8th Cir.) 126 Fed. (2d) 872, and *Bumpus v. Continental Baking Co.* (CCA 6th Cir.), 124 Fed. (2d) 549. They are not in point, because the contract was for an hourly rate of pay in both instances. In the Sklar case, the court said that it was shown conclusively that the employee was being paid at an hourly rate and not a flat salary. Bumpus v. Continental Baking Company was cited by the Supreme Court in *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, opinion 580, as being one of the decisions supporting its holding in the Missell case, that the regular rate of pay is determined by dividing the fixed weekly wage by the total number of hours actually worked. The court said:

> "This method of computation has been approved by each Circuit Court of Appeals which has considered such problems." (Op. 580, citing

Bumpus v. Continental Baking Co., 124 Fed. (2d) 549-552).

It therefore appears that the authorities cited by Petitioners are not in point, and fail to support their contention that although hours spent in the fire hall should be counted as hours of work, yet they must not be considered in arriving at the regular rate of pay.

But if they are so considered, it is undisputed that Petitioners were employed by Respondent at a fixed weekly salary to perform their work as elevator operators, relief men and firemen, and they also agreed to remain in the fire hall or within hailing distance subject to call in the event of fire or other casualty. Under these facts, Petitioners got a certain weekly wage for their work, whatever it was.

Respondent therefore insists that if all time spent in the fire hall is held to be time worked, then the weekly salary was for the entire amount of such time, and this is the only construction of the contract of employment that can reasonably be adopted.

B.

Petitioners worked for fixed weekly salaries and a fluctuating number of hours each week, under contracts of employment containing no express or implied agreement regarding the basis on which overtime compensation, if any, should be paid. Under the Fair Labor Standards Act, their regular rate of pay is determined by dividing their weekly salaries by the total actual hours worked each week.

It has always been the contention and ruling of the Administrator that if the employee is on a weekly

salary basis for either a regular or fluctuating number of hours, his regular hourly rate of pay on which time and a half must be paid is computed by dividing the salary by the regular number of hours worked, or if no regular number of hours are worked, by the total number of hours worked each week. Administrator's Interpretative Bulletin No. 4, Paragraphs 10 to 12, incl., W. & H. Questions and Answers No. 9, Release No. R-198, Feb. 27, 1939 (*2 Labor Law Service*, Sect. 32104).

The whole subject is exhaustively discussed by the Circuit Court of Appeals, Fourth Circuit, in *Missell v. Overnight Transportation Co.* (CCA, 4th Cir.), 126 Fed. (2d) 98, opinion, pages 106 to 110, inclusive. It seems to Respondent that the matter is set at rest by the decision of the Supreme Court in the *Missell Case*, 316 U. S. 572.

There the court held that where the contract merely provided for a weekly wage with variable or fluctuating hours, the regular rate of pay is determined by dividing the weekly wage by the number of hours worked during the work week. The court said:

> "Apart from the Act if there is a fixed weekly wage regardless of the length of the work-week, the longer the hours the less are the earnings per hour. This method of computation has been approved by each Circuit Court of Appeals which has considered such problems. See Warren Bradshaw Drilling Co. v. Hall, 124 F. 2d 42, 44 (5 Labor Cases 60821); Bumpus v. Continental Baking Co., 124 Fed. 2d 549, 552 (5 Labor Cases 60,816), cf. Carleton Screw Products Co. v. Fleming, 126 F. 2d 537, 541 (5 Labor Cases 60,991). It is this quotient which is the 'regular

rate at which an employee is employed under contracts of the types described and applied in this paragraph for fixed weekly compensation for hours, certain or variable." (316 U. S. 572, 580).

Finally, it must be remembered that the Supreme Court in the Missell Case affirmed the opinion of the Circuit Court of Appeals, 126 Fed. (2d) 98, and on page 110 of that opinion, the Circuit Court presents a specific example of the proper method of calculating the regular rate of pay. The court supposes a salary of $30.00 for a work week of 50 hours, which would make the regular rate of pay $30.00 divided by 50, or sixty cents (60c) per hour. Thus the employee's total earnings for the week would be $33.00, computed as follows:

40 hours at 60c per hour (straight time)	$24.00
10 hours at 90c per hours (time and one-half)	9.00
Total	$33.00

The court then said that the following week the employee's total earnings would be similarly computed, and so on each week.

PART II. REPLY TO WAGE AND HOUR ADMINISTRATOR'S BRIEF.

Page 8 of the able brief of the Administrator explains his position as follows:

The problems presented by many inquiries with respect to the applicability of the Act to periods of inactivity or idleness required a practical flexible interpretation, consistent with the ordinary meaning of work, rather than a rigid "either-or" rule, which would either entirely include or entirely exclude all inactive duty. He made an effort to provide such a practical guide through Interpretative Bulletin No. 13 issued in May, 1939, unchanged since as to paragraphs pertinent here.

He refers to paragraphs 6 and 7 of the Bulletin as covering two different situations, but asserts that the facts of the Skidmore case do not fall clearly within either (pp. 9 and 10).

He wisely adopts a flexible interpretation by conceding that time spent by Petitioners while eating and sleeping does not constitute employment compensable under the Act. (First Proposition, Brief p. 6). He then perhaps inadvertently applies the "either-or" rule to the rest of the time spent by Petitioners in the fire hall while shaving, dressing, bathing, playing games and engaging in other strictly personal activities which they would pursue, whether in the fire hall or at home. The test is applied exclusively to time spent in the fire hall, rather than to the employees' entire time for a week or month, which is the true test under the principles and spiri

of the Bulletin on which employers, employees and courts have long relied. In this, it is submitted that the Administrator fell into error for these reasons:

Respondent agrees with the Administrator that the Skidmore case is not analogous to the second situation mentioned on page 9 of the Administrator's brief, where the employee has periods of inactivity for varying lengths of time between intermittent periods of active duties; exemplified by messenger boys, chauffeurs, employees waiting for materials to be furnished or waiting for loading or unloading of railroad cars, etc. Such cases as *M. K. & T. R. R. Co. v. United States*, 231 U. S. 112; *Walling v. Allied Messenger Service, Inc.* (S. D. N. Y.) 47 Fed. Supp. 773; *Travis v. Ray* (W. D. Ky.) 41 Fed. Supp. 6, and others of like import, cited by the Administrator and Petitioners, are not in point. Respondent does not contest these holdings nor the Administrator's interpretation in these instances. As said by the trial court, it is often true that waiting time, subject-to-call time, travel time, etc., should be treated as work, but such cases do not control here. (R. 28-29).

Respondent submits, however, that the Skidmore case falls either within the bounds of the first situation stated on page 9 of the Administrator's brief, where the employee stays on employer's premises under the circumstances shown, or it falls within the general rules laid down by the Administrator in 1939.

Paragraph 6 of Bulletin 13, attached to the Administrator's brief, states that in a few occupations, periods of inactivity need not be considered as hours

worked, even though the employee is subject to call. It is said the answer depends on many things, some of which are * * * degree to which the employee is free to engage in personal activities—number of consecutive hours employee is subject to call without performing active work, i. e., frequency with which he engages in work—his opportunity for uninterrupted sleep, conducting personal business affairs, carying on a normal routine of living, etc. An example is given of the employee of a small telephone exchange operating a switchboard in her house.

Paragraph 7 of the Bulletin deals with employees engaged in active work part of the day, but required to be on call 24 hours a day, such as oil well pumpers, caretakers, custodians, watchmen of lumber camps, etc. Here it was said that the fact that the employee lives on the premises does not mean he is working 24 hours a day. The *reason* for this conclusion was stated to be that "In the ordinary course of events, the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases, the employee may be free to come and go during certain periods." It was further stated that no precise formula will solve the situation, and that the Administrator would accept reasonable standards agreed upon, between the employer and employee.

It cannot be assumed that these paragraphs of the Bulletin could cover *all cases*, nor that any particular case must meet *all* requirements of the rules. It follows that a particular case must be decided ac-

cording to the broad intent and purpose of the rules, and that common-sense construction is demanded.

The position cannot be taken that since Petitioners stayed in the fire hall at times when they might otherwise have been at home, they were working, because it is too narrow. The test should be applied by taking their time for a week or month and inquiring—did they do about the same character of things in the fire hall that they would have done at home? Were they frequently required to perform active work? Did they have ample opportunity for uninterrupted sleep, ample time for their meals and conducting their personal affairs, and as much time as the average citizen for relaxation, entirely private pursuits, going to the movies, etc.?

Paragraph 7 of the Bulletin illustrates the point. There, pumpers, caretakers, custodians and watchmen were not considered as working twenty-four hours a day, *because* they had ample time for sleeping and eating, relaxation and entirely private pursuits, being free to come and go during certain periods. Petitioners had the same opportunities — probably more; certainly no less. Living on the premises, although the employee had a home of his own, is not controlling. *Muldowney v. Seaberg Elevator Co.* (E. D. N. Y.) 39 Fed. Supp. 275, middle right-hand column, page 282.

It therefore follows that this case must be governed by the same broad, general purpose and intent of the Administrator's rules as were applied to oil pumpers, caretakers, custodians or watchmen of lumber camps.

Otherwise, utter confusion would exist among employers attempting to comply with the Administrator's ruling.

Attached to the Administrator's brief are his letters written in August and October, 1943, expressing his views as of that date, with respect to requests from operators of United States Ordnance Depots, who then proposed to institute a two-platoon system for firemen; required to be on call for twenty-four hours. The Administrator excluded sleeping and eating time, and also time for personal affairs such as shaving, bathing, etc., and approved the requests.

The trouble with this evidence is that it orginiated four or five years subsequent to the transactions involved in the case at bar, and is not in sufficient detail to afford a comparison. The undertaking was a new one, and the rate of pay is not shown.

It is to be doubted that the Ordnance Depot Firemen are paid $325.00 a month, which would be the rate required, excluding penalties, under Petitioners' demands here.

CONCLUSION

The judgment should be affirmed, or if reversed, the case should be remanded for determination of defensive pleas, hours of work, application to the facts of the regular rate of pay, and a finding on attorney's fees.

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Nos. 12 and 73

In the Supreme Court of the United States

OCTOBER TERM, 1944

SKIDMORE ET AL., PETITIONERS

v.

SWIFT AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARMOUR AND COMPANY, PETITIONER

v.

WANTOCK AND SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 12

SKIDMORE ET AL., PETITIONERS

v.

SWIFT AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73

ARMOUR AND COMPANY, PETITIONER

v.

WANTOCK AND SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour

Division, United States Department of Labor, as *amicus curiae*.

OPINIONS BELOW

No. 12

The opinion of the District Court for the Northern District of Texas (R. 26–29), rejecting the petitioners' claim, is unreported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 62–64), affirming the District Court, is reported in 136 F. (2d) 112.

No. 73

The opinion of the District Court for the Northern District of Illinois (R. 7, 29), rendering a judgment in favor of the plaintiffs, is not officially reported, but is printed in 6 Lab. Cases 61,313. The opinion of the Court of Appeals for the Seventh Circuit (R. 42), affirming the District Court, is reported in 140 F. (2d) 356.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals in case No. 12 was entered on June 1, 1943 (R. 64). The petition for writ of certiorari was filed August 2, 1943. The petition was denied on October 11, 1943 (320 U. S. 763, 812), but the order denying certiorari was vacated and certiorari was granted on May 29, 1944 (64 S. Ct. 1256).

The judgment of the Seventh Circuit Court of Appeals in case No. 73 was entered on February

5, 1944 (R. 46). The petition for certiorari was filed on May 2, 1944 and granted on May 29, 1944 (R. 55; 64 S. Ct. 1265).

The jurisdiction of this Court in both cases rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The main question involved in both cases is: Whether all or any part of the time employees are required to remain on the employer's premises on call for fire duty constitutes employment for which compensation must be paid under the Fair Labor Standards Act.

In case No. 73, the further question is presented, whether such fire duty is an "occupation necessary to the production" of goods for commerce within the coverage of the Act.

STATUTE INVOLVED

The sections of the statute primarily involved are Sections 3 (d), 3 (e), 3 (g), 3 (j), and 7 (a). These sections appear in the Appendix, *infra*, pages 43–44.

STATEMENT

Both suits were instituted by employees under Section 16 (b) of the Fair Labor Standards Act to recover unpaid overtime compensation allegedly required by Section 7. In each case, the employees were required to perform fire duty several evenings and nights a week in addition to their

regular day time work. This duty involved remaining on or near the employers' premises from twelve to fifteen hours after the regular working day, subject to call in case of a fire alarm. In neither case did the employees live on the company's premises; they slept there only on the nights they were on duty. In both cases sleeping accommodations and recreational facilities were furnished by the employer in the fire hall building, and the employees spent their time, when not answering emergency alarms, reading, talking, playing games, listening to the radio or sleeping. The detailed facts in each case are adequately stated in the briefs of the parties.

The District Court in the *Skidmore* case ruled that although the employees "for their allotted time at the fire hall * * * were required to be there," and although being there "was their duty as much as performing their regular work" (R. 27), nevertheless "pursuing such pleasurable occupations or performing such personal chores, does not constitute work." *Ibid.* The Fifth Circuit affirmed, reasoning that "The Act does not require payment of wages to an employee merely because he is away from home," nor does it "undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed." It ruled that "Certainly plaintiffs are not entitled to recover overtime compensation for sleeping," and since their proof

failed to segregate sleeping from non-sleeping and playing time, the judgment against them would stand: "Even if the plaintiffs had been entitled to recover for hours spent in boredom, or waiting for bedtime or an alarm * * *" (R. 64).

In the *Armour* case, the District Court ruled that the employees were entitled to compensation for all the time "on call" except the time regularly spent in sleeping or in eating meals. The court said that for the remainder of the time the employee "has not freedom to do whatever he may desire, he may not be with his family, or attend a theatre or other place of amusement. He is serving his employer" (R. 7). The parties stipulated that seven hours were regularly spent in sleeping and one and one-half hours in eating (R. 27), and the court ruled that this eight and one-half hours should not be included as working or employment time. The District Court also ruled that fire duty is an occupation just as necessary to production of goods for commerce within the meaning of the Act as are "watchmen employed to protect the building in which production is carried on from theft and fire" (R. 29–30).

The Seventh Circuit affirmed. On the question of the coverage of the Act, the court said that "an auxiliary fireman is not unlike a night watchman," and therefore the decisions in *Walton* v. *Southern Package Corp.*, 320 U. S. 540, and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, were controlling (R. 43).

On the question of working or employment time, the court said that the *Skidmore* decision of the Fifth Circuit was distinguishable on the facts, in that there was an agreement in that case to pay special separate compensation in case the employee received a fire call. The court stated, however, that it was "not certain that such distinction would or should materially affect the conclusion" (R. 44). It expressed the opinion that "notwithstanding the latitude they [the employees] had in their activities, * * * their legal status was that of employee during that time," that such employment was not among the activities expressly exempted from Section 7, and that therefore the court should not read such an exemption into the Act (R. 44–45). With respect to the exclusion of sleeping and eating periods from the computation of the working time, the Court of Appeals said that it did not have before it the correctness of this ruling, since no appeal had been taken from that part of the judgment.

ARGUMENT

I

THE TIME SPENT BY EMPLOYEES ON DUTY AS AUXILIARY FIREMEN, EXCEPT FOR THE REGULAR EATING AND SLEEPING PERIODS, CONSTITUTES EMPLOYMENT COMPENSABLE UNDER THE ACT

The result reached in the *Armour* case by the courts below is in accord with the Administrator's interpretation, while the decisions below in the

Skidmore case are contrary to the Administrator's views. This Court pointed out in *Tennessee Coal Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 597, that there is not "any precise statutory definition of work or employment" to guide the determination in particular situations of this character.[1] But under the principles announced by this Court in the *Tennessee Coal* case, *supra*, the interpretation which treats the "on call" duty, except for the regular sleeping and eating periods, as compensable time, seems the correct one. This interpretation, it is believed, not only construes the words "work" and "employment" in the sense in which "those words are commonly used" (*Tennessee Coal* decision, 321 U. S., at 598), but also adopts "a realistic attitude" with due regard to the "remedial and humanitarian" purpose of the Act. (*Id.*, at 592, 597).

While admittedly the fire duty in question does not impose burdensome labor upon the employees, it unquestionably claims their time and liberty, and "is required by the employer and is pursued necessarily and primarily for his benefit and business." *Tennessee Coal* case, 321 U. S., at 598. Under the ordinary meaning and the dictionary definitions of the words "work" and "employ," the duty involved here constitutes employment.

[1] "It is perhaps true," as the Seventh Circuit said, "that Congress did not visualize a case of this kind when the Act was passed." (R. 45.)

The Armour and Swift companies, in requiring such duty of employees, "make use of the services of" and "give employment to" them and "entrust [them] with some duty or behest."[2] The contention that the companies are furnishing the employees with "recreation" rather than employment (see Armour and Company's brief in support of petition, p. 17), is spurious. And the statement of the Fifth Circuit that "'working' is not synonymous with 'availability for work'" ignores the time and service the employee is contributing while on fire duty and the restraint imposed upon his liberty. This is not a case where the employee "merely had to leave his telephone number or place where he could be found." Compare *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90, 92 (C. C. A. 5). Nor, as the trial court in the *Armour* case observed, is the situation "the same as that of one living on the premises of the

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[2] See *Tennessee Coal & Iron* case, *supra*, 321 U. S., at 598, footnote 11, quoting the definitions of "employ" from Webster's New International Dictionary (2nd ed., unabridged). The term "work" has been defined to include "employment," "task," "duty." See Webster's International Dictionary (2nd ed.); *State* v. *Rose*, 125 La. 462, 466, 51 So. 496, 497 (1910); *Chicago & A. R. R. Co.* v. *Bragonier*, 119 Ill. 51, 63, 7 N. E. 688, 693 (1886).

See Interpretative Bulletin 13, par. 8, Appendix, *infra*, p. 27, where the Administrator has stated that if "* * * the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to **any particular place, such time need not ordinarily be considered hours worked.**"

employer and subject to call but generally free to go or come as he pleases" (R. 7). The employees here, on the evenings and nights when they are on fire hall duty, are tied down within the confines of the employers' premises from 12 to 15 hours in addition to the regular day's work. While the Administrator is of the opinion that a practical construction of "employment" in accordance with common understanding might justify excluding from the computation of compensable time uninterrupted eating and sleeping periods, neither the statutory language nor the need for a common sense application of the Act warrants the extreme view advanced by the employers here and adopted by the courts below in the *Skidmore* case.

The Administrator, in the early months after the enactment of the Fair Labor Standards Act, received many inquiries with respect to the applicability of the Act to periods of inactivity or illness due to the nature of the employment. The problems thus presented appeared to require a practical flexible interpretation, which would be most consistent with the ordinary meaning of "work" or "employment," rather than a rigid "either-or rule," which would either entirely include or entirely exclude all inactive duty.[1] An effort to provide such a practical guide

[1] See *Addison v. Holly Hill Fruit Products Co.*, 64 S. Ct. 1215, 1223; *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 198.

was made in an interpretative bulletin issued by the Administrator in May of 1939.[1] Paragraphs 4 through 8 of the bulletin were devoted to questions relating to "waiting time and employees subject to call." The precise problem of auxiliary firemen's duty was not explicitly dealt with, but specific answers were given by the bulletin with respect to two types of related problems: (1) the situation where the employee, although he is required to live on the employer's premises or to be on call at his own home, regularly has both a normal night's sleep and freedom to conduct his personal affairs and to carry on a normal routine of living; and (2) the situation where the employee has periods of inactivity for varying lengths of time between intermittent periods of active duties, and must remain conveniently available during the inactive periods to be ready to perform the active duties when called upon. Examples of the first type given in the bulletin are: a pumper of a stripper well who must be on hand at all times to start the pump up when it stops (at any time during the day or

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[1] Interpretative Bulletin No. 13. This was released to the press on May 3, 1939 (Wage and Hour Division Release Files, R 272), and was issued in printed form in July 1939. The bulletin was subsequently revised in respects not relevant here. The paragraphs pertinent here, that is, those relating to waiting time and time on call, have remained unchanged since the date the bulletin was originally issued. A copy of the most recent issue of the bulletin is printed in the Appendix, pp. 22–38.

night), custodians or watchmen living at lumber camps during the off season, a telephone operator of a small exchange operating a switchboard located in the employee's house (Bulletin 13, pars. 6 and 7). Examples of the second type are: messenger boys who sit around in the office and wait for messages to be routed out, a chauffeur who must hold himself in readiness to drive company officials to and from appointments, employees waiting for materials to be furnished or waiting for the loading or unloading of railroad cars, employees required to remain on the employer's premises after regular working hours to furnish emergency service to customers when called upon (Bulletin 13, pars. 4, 5, 8).

In cases of the first type, the bulletin states that "a reasonable computation of working hours" which segregates and excludes "several hours of uninterrupted sleep every night" seems justified and is acceptable to the Wage and Hour Division for administrative purposes (pars. 6 and 7). In situations of the second type the bulletin states that the employee's "time is not his own while he remains conveniently available to carry out the instructions of his employer", and therefore the time so spent should be considered working time (pars. 4, 5, and 8).

For the situations which do not fall clearly within one or the other of these two types the bulletin offers no specific answer, but states that the answer "will depend generally upon the de-

gree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work" (par. 6). The opinion is expressed that where an employee is subject to call after the completion of his regular working day, the time should be considered compensable if he "is required to remain in or about the place of business of the company," but need not ordinarily be considered compensable "if the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to any particular place" (par. 8).

It will be seen that the problem in the instant cases falls in the general class for which no definite answer is offered. The employees here do not perform their fire duty at their own residences; they are required to remain on the company's premises, and consequently they do not have the freedom to engage in "entirely private pursuits" and "to carry on a normal routine of living." On the other hand, the employees here, with rare exceptions, were able to secure several consecutive hours of uninterrupted sleep and time in which to eat their meals—purely private pursuits which presumably would occupy their time whether or not they were on duty, and pursuits which are not substantially circumscribed by the

demands of the duty. It is true, as the petitioners in the *Skidmore* case point out, that even during such eating and sleeping periods, the employees nonetheless render an important service to the employer, and their freedom is restricted to the extent that they and their families are deprived of the comfort and companionship of being together. Therefore, the contention that all of such time should be held compensable is not without substance.[5] However, the Administrator has concluded that under the principles expressed in his bulletin, the more reasonable view was that the usually uninterrupted eating and sleeping periods might be excluded but that the remainder of the time on duty including, of course, all time actually spent in answering alarms should be treated as part of the hours of work or employment for purposes of the Act.[6] The Administrator has consistently expressed this view in answer to all inquiries regarding auxiliary fire duty, and he has been advised that several employers have put this interpretation into practice.

The reasoning of the trial and appellate courts in the *Skidmore* case, that only hours spent in active work or exertion, or "hours of toil" (R. 63), are compensable under the Act, is contrary to

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[5] In support of this position, see *Whitsitt* v. *Enid Ice & Fuel Co.*, 5 Wage Hour Rept. 636 (W. D. Okla. 1942).

[6] See, for example, the letters printed in the Appendix, pp. 38–42, with respect to the proposed practices of the Silas Mason Company and Sears Roebuck and Company.

both the language and the spirit of the Act and finds no support in the authorities interpreting this and analogous employment statutes.[*] The Administrator's construction that hours of employment "are not limited to the time spent in active labor, but include time given by the employee to the employer even though part of the time may be spent in idleness" (Interpretative Bulletin No. 13, par. 4), is amply supported by the decisions of this Court. In *Missouri, K. & T. R. R. Co.* v. *United States*, 231 U. S. 112, this Court held that time spent "waiting, doing nothing" while the engine was sent off for water and repairs, should be included in determining whether the employees had been on continuous duty in violation of the provisions of the Hours of Service

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[*] Similarly, the contention of the petitioner in the *Aymour* case (see petitioner's brief, pp. 25-26) that the word "employ" means only and literally to suffer or permit to *work* is untenable. The application of the Act does not in terms depend upon the performance of physical or active work. The word "employ" even more than the word "work," characterizes the scope of the Act. Section 3 (g) does not say that "employ" *means* to suffer or permit to work; it says that "'employ' includes to suffer or permit to work." Thus it appears that the definition was designed to broaden, not to narrow, the meaning of the word "employment." See *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 188-189. Compare the definitions of "person," "commerce," "state," "industry," "goods," "produced," "oppressive child labor," where the word "means" is used (Sec. 3) (a), (b), (c), (h), (i), (j), (l), with the definitions of "employer," "employee," "agriculture," "employ," "sale," and "wage," where the word "includes" is used (Sec. 3) (d), (e), (f), (g), (k), (m)).

Act. Mr. Justice Holmes, speaking for the Court, pointed out that the employees "were under orders, liable to be called upon at any moment, and not at liberty to go away." He held that they were "nonetheless on duty when inactive. Their duty was to stand and wait" (231 U. S., at 149).[2]

Although the employment involved in the case of *Tennessee Coal Iron & R. R. Co.* v. *Muscoda Local* was "hard labor," this Court recognized that inactive duties also constitute employment within the scope of the Act. The Court explicitly noted that "employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call have been held to be engaged in work necessary to production and entitled to the benefits of the Act" (321 U. S., at 399), and cited the cases of *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Fleming* v. *North Georgia Mfg. Co.*, 33 F. Supp. 1005 (N. D. Ga.); *Travis* v. *Ray*, 41

[2] To the same effect see *United States* v. *Southern Pac. Co.*, 245 Fed. 722 (C. C. A. 9); *Minneapolis & St. L. R. R. Co.* v. *United States*, 245 Fed. 60 (C. C. A. 8), certiorari denied, 245 U. S. 666; *San Pedro, L. A. & S. L. R. R. Co.* v. *United States*, 213 Fed. 326, 329 (C. C. A. 8); *United States* v. *Denver & R. G. R. R. Co.*, 197 Fed. 629 (D. N. Mex.); *United States* v. *Illinois Cent. R. R. Co.*, 180 Fed. 630 (N. D. Iowa), and *United States* v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783 (W. D. Wash.). See also *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158.

F. Supp. 6 (W. D. Ky.); *Walling* v. *Allied Messenger Service, Inc.*, 47 F. Supp. 773 (S. D. N. Y.).

It is common knowledge that a night watchman spends many of the hours he is on duty in idleness during the intervals between his rounds. Yet the courts, which have uniformly held watchmen's duties to be within the scope of the Act, have not distinguished between this kind of inactivity and the more active duties. The Eighth Circuit, in fact, has emphatically ruled that an agreement to pay employees only for their active manual labor and not for the additional time they are "required to remain at their places of duty as caretakers and watchmen" is invalid. *Johnson* v. *Dierks Lbr. & Coal Co.*, 130 F. (2d) 115 (C. C. A. 8). The facts of that case were strikingly similar to the situations in the instant cases. The plaintiffs were employed to grease and service trucks and tractors and to perform other manual labor, and, in addition, to act as watchmen to prevent vandalism at the lumber camps. They were required to sign an agreement stating that their working hours did not exceed more than six hours a day. This in fact was an agreement to pay the employees only for the hours devoted to manual labor. The Eighth Circuit held that such an agreement "frustrated" the purposes of the Act, and that the employees were entitled to compensation for their duties as caretakers and watch-

men, as well as for their manual labor. 130 F. (2d) at 119–120."

In the case of *Walling* v. *Allied Messenger Service, Inc., supra*, which this Court cited in the *Tennessee Coal* opinion, a considerable amount of time spent each day by messengers merely waiting in the employer's office for calls was held to be compensable employment. 47 F. Supp., at 778, 779. And in *Travis* v. *Ray, supra*, waiting periods of from one to three hours spent by bus drivers between runs, including three hours at night spent "trying to get some sleep in the bus," were held to

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[10] The majority opinion in the *Johnson* case made no explicit ruling on sleeping time. In a concurring opinion, however, Judge Stone said that "in the factual situation shown in this present record," where it appeared that the employees slept "an average of eight or nine hours a night," the sleeping hours should be excluded from employment hours. 130 F. (2d) at 121. Judge Stone said, however, that he did "not mean that in every case nor under all circumstances, sleeping hours should be excluded"; it "must depend upon the factual situation of each case." (*Ibid.*) See *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898, 902 (D. Minn.), holding that where a night switchboard operator could rest or doze, but was not able "to enjoy 'several hours of uninterrupted sleep' or sleep for any substantial period," the sleeping time must be regarded as employment time under the Act. Cf. *Muldowney* v. *Searing Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.), where the court held that an employee, who was required to sleep every night on the company's premises, was not entitled to recover for time consumed in "a normal night's sleep," in eating meals, and in entirely private pursuits, such as dressing and shaving.

be hours of employment within the coverage of the Act." The Court reasoned that the driver "had to hold himself available and be ready for duty," and "being on duty subject to call if one's service should be required, is as much employment in the legal sense of the term as actual labor." 41 F. Supp., at 9. As this Court said in the *Tennessee Coal* case, the Act "must not be interpreted or applied in a narrow grudging manner" but must be viewed as "necessarily indicative of a Congressional intention to guarantee * * * compensation for all actual work or employment."

" See also *Walling* v. *Dunbar Transfer & Storage, Inc.*, 6 Wage Hour Rep. 476 (W. D. Tenn. 1942), holding that the hours for which the drivers and helpers employed by a property motor carrier must be compensated "include not only the hours that employees were actually engaged in specific assignments," but also "the time spent in waiting about the premises for an assignment, as well as time spent in traveling from defendant's place of business to freight terminals and waiting for an opportunity to load defendant's trucks"; *Walling* v. *Sun Pub. Co.*, 47 F. Supp. 180, 191 (W. D. Tenn.), affirmed 140 F. (2d) 445 (C. C. A. 6), certiorari denied 64 S. Ct. 946, holding that radio engineers are entitled to compensation, when they are on duty during broadcasts, for periods of inactivity between the half hour meter readings "as they were obliged to remain on or near the premises to enable them to carry out the tasks for which they were responsible" (Conclusions of Law 9); *Beck* v. *Zarnoch*, 33 N. Y. S. (2d) 582 (Sup. Ct. N. Y., N. Y. Co., 1941), holding that periods of inactivity characteristic of plaintiff's job as general assistant to a band leader during the making of recordings and radio broadcasts were compensable employment "since he was required to be present ready to work during all the time involved."

321 U. S., at 597–598. The Act was not designed to perpetuate practices or agreements which "allow an employer to claim all of an employee's time while compensating him for only part of it." (*Ibid.*) See also *Johnson* v. *Dierks Lumber & Coal Co.*, *supra*, 130 F. (2d) at 120.

II

FIRE DUTY IN A BUILDING DEVOTED TO THE PRODUCTION OF GOODS FOR COMMERCE IS AN OCCUPATION NECESSARY TO SUCH PRODUCTION WITHIN THE MEANING OF THE ACT

The Seventh Circuit correctly ruled that "an auxiliary fireman is not unlike a night watchman," and that therefore this Court's decisions in *Walton* v. *Southern Package Corp.*, 320 U. S. 540, and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, are controlling on the coverage question (R. 43). In the *Kirschbaum* case, this Court described the duties of the watchman as protecting "the buildings from fire and theft" (316 U. S., at 519), and in the *Walton* case it was pointed out that the watchmen's duty was to "report any fires and trespassers" (320 U. S., at 542). The duty to be on hand to put out fires when they occur is no less necessary to the protection of the building than the duty of watching for and reporting fires and theft.

Petitioner Armour's contention that the auxiliary fireman's duty was not indispensable but

simply for the purpose of reducing insurance costs (brief p. 22–24) was explicitly answered by this Court in the *Walton* case. In that case also it was argued that the primary reason why a night watchman was employed was to secure reduced fire insurance premium rates. This fact, said the Court, did not indicate that the watchman was not necessary for the production of goods for commerce, but on the contrary. "The very fact that a fire insurance company was willing to reduce its premium upon conditions that a night watchman be kept on guard is evidence that a watchman would make a valuable contribution to 'the continuous production of respondent's goods'" (320 U. S., at 542).

Even if it be assumed that auxiliary firemen were not "indispensable" to the protection of the building in the instant case (see Armour and Company's brief pp. 19, 21–23) it would not follow that such employment was outside the scope of the Act. As the District Court in the *Armour* case pointed out (R. 30), this Court long ago ruled that the word "necessary does not always 'import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without the other' but that 'it frequently imports no more than that one thing is convenient, or useful, or essential to another.'" *McCulloch* v. *Maryland*, 4 Wheat. 316, 413.

CONCLUSION

It is respectfully submitted that the judgment of the Fifth Circuit in No. 42 should be reversed, and the judgment of the Seventh Circuit in No. 73 should be affirmed.

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APPENDIX

A

INTERPRETATIVE BULLETIN NO. 13

HOURS WORKED—DETERMINATION OF HOURS FOR WHICH EMPLOYEES ARE ENTITLED TO COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT OF 1938

First issued July 1939. First revision (par. 15) October 1939. Second revision (par. 15) October 1940. Revised November 1940. United States Department of Labor, Wage and Hour Division, Office of the Administrator.

GENERAL

1. The accurate determination of what constitutes hours worked is essential in order to establish whether the minimum wage and maximum hours requirements of sections 6 and 7 of the act have been satisfied. This bulletin is intended to indicate the course which the Administrator will follow with respect to the determination of employees' hours of work in the performance of his administrative duties under the act, unless he is directed otherwise by the authoritative rulings of the courts or unless he shall subsequently decide that his interpretation is incorrect. The manner of computing minimum wages and overtime compensation which is discussed in Interpretative Bulletin No. 4 is not within the scope of this bulletin.

2. The act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for purposes of enforcement of the wage and hour standards. As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include, in the ordinary case, all hours from the beginning of the workday to the end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals.[1] The following specific problems with respect to the determination of hours worked which have been presented for our consideration are not sufficiently answered by this formula, however, and more detailed discussions of these problems are, therefore, set out in the following paragraphs.

TIME CLOCKS

3. Neither the statute nor Regulations, Part 516 (Requirements for Keeping Records), require that time clocks be used or specify the manner in which an employer has to keep a record of the number of hours worked by his employees. Time

[1] No opinion can be expressed at this time as to certain cases—e. g., employees engaged in mining or in working under high pressure—where by custom or agreement time spent eating meals is paid for as hours worked.

clocks where used will be an appropriate basis for recording hours worked only when they accurately reflect the period worked by the employee. Whether or not time clocks accurately reflect the period worked by the employee is to be determined by the formula in the preceding paragraph. It should be noted also that if the employer requires the employees to punch a time clock and the employee is required to be present for a considerable period of time before doing so, such time will be considered hours worked.

WAITING TIME AND EMPLOYEES SUBJECT TO CALL

4. Many inquiries have been received with respect to periods of inactivity due to the breakdown of machinery and time spent in waiting for materials to be furnished or waiting for the loading or unloading of railroad cars or other vehicles of transportation. Generally, the time during which an employee is inactive by reason of interruptions in his work beyond his control should be included in computing hours worked either if the imminence of the resumption of work requires the employee's presence at the place of employment *or* if the interval is too brief to be utilized effectively in the employee's own interest. This result would not be affected by the fact that the employer tells his employees that they are free to leave the premises. Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer even though part of the time may be spent in idleness.

5. Many inquiries have likewise been received regarding employments, the very nature of which

involve periods of inactivity for varying lengths of time. Ordinarily such periods of inactivity during which employees are on duty should be considered hours worked. Thus, for example, messenger boys who sit around in the office and wait for messages to be routed out should be considered as working not only when they are actually delivering messages but also while waiting for such messages to be assigned. Similarly, a chauffeur who is required to drive officials of a company engaged in the production of goods for commerce should be considered as working not only when he is actually driving such officials but also during the time he is obliged to hold himself in readiness to drive. In these cases the employee engages in active work intermittently, but his time is not his own while he remains conveniently available to carry out the instructions of his employer.

6. In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i. e., the frequency with which the employee is called upon to engage in work. In these cases, the nature of the employee's work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small

telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of uninterrupted sleep every night, as experienced over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer only a few calls between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified.

7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which

to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division.

8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular working hours to furnish emergency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked. If, on the other hand, the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to any particular place, such time need not ordinarily be considered hours worked. The employee, however, should be considered as working at any time during which he is actually making a call and his hours worked would include all time traveling to and from such a call.

TRAVEL TIME

9. The problem of travel time, in relation to hours worked, arises in a great variety of situations and no precise mathematical formula will provide the answer in every case. The question is often one of degree; if the time spent by an employee in traveling is reasonably to be described as "all in a day's work," such time should be considered hours worked under the act.

10. As a general rule it may be stated that an employer should treat time spent by an employee during regular working hours in traveling pursuant to the employer's instructions as hours worked. If an employer requests his employee to do a job during regular working hours which require the employee to leave the place of business, the traveling time of the employee should be included in hours worked, and this is true whether or not the particular job is within the employee's regular duties.

11. In many cases travel time outside of regular working hours is considered "part of the day's work" and, accordingly, should be treated as hours worked. Thus, an employee whose normal working day extends from 8 a. m. to 5 p. m. may be requested by his employer at 5 p. m. to make one more outside call which involves 2 hours of traveling time (to get to the place where the work is to be performed and report back to the office) and active labor of 1 hour. In such case the employer may not disregard the travel time in computing the number of hours worked by the particular employee; the employee's working day would extend from 8 a. m. to 8 p. m. In this case the employee engages in active labor for his employer after the close of his regular working day and prior to the commencement of his next regular working day, and his activities between 5 p. m. and 8 p. m. are, under the circumstances, reasonably to be considered as a continuation or extension of his normal working day. The same results, of course, would be reached if the employer requested his employee to report for work

2 hours earlier in the morning in order to make the one extra call.

12. If a crew of workers is required to report for work at a designated place at a specified hour and all the employees are then driven to the place where they are to perform work, the time spent in riding to such place should be considered hours worked. Similarly, the time spent returning from the place at the close of the day's work should be considered hours worked. In some cases, however, the employer requests his employees to report for work at a specified hour at the place where the work is to be performed instead of at the employer's place of business. In these cases the employee's working time may be considered to begin at the time he reports for work, unless the traveling time required in order to reach the place where the productive work is to be performed is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer. No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and reasonable standards agreed upon between the employer and employee will be accepted for purposes of the act.

13. In some cases an employee is required to travel continuously for more than a full working day during which time the employee is not engaged in actual productive work for his employer. For example, an employee whose regular working hours extend from 8 a. m. to 5 p. m. may be required to spend 2 or 3 days and nights of continuous travel to reach a place where he is to per-

form assigned work. In such case, as indicated generally in paragraph 10, time spent traveling during the regular working hours should be considered hours worked. Travel time outside of regular working hours need not ordinarily be considered hours worked. If, however, the employee is required to travel on Saturdays, Sundays, and holidays, he should be considered as working on those days for the number of traveling hours between his established starting and stopping time on other days of the week. In determining whether the foregoing is applicable, factors such as the length of time required to reach the place where the assigned work is to be performed, whether the employee is given adequate time for sleeping and relaxation, the time that the employee is required to report for actual productive labor, etc., are very important.

14. Inquiries have been received with respect to employees who are required to travel continuously for several days and who perform active labor while traveling. Thus, for example, when cattle or poultry, etc., are sent to market by rail, an employee of the shipper is required to travel on the train in order to water and feed the stock en route. In other cases an employer who ships machinery by train to a distant customer requires an employee to oil the machinery en route and otherwise to see that it arrives in perfect condition. The employee generally rides in the caboose with the train crew. In each of the foregoing cases, the employees are subject to call for 24 hours a day, but time required for active work by such employees would ordinarily be much less. The em-

ployee generally has a substantial amount of time for sleeping, eating, relaxation, etc.[2] No precise formula will decide this type of case and any reasonable agreement entered into between the parties or established by custom and usage which takes into account the amount of time required for active labor by the employee and the fact that the employee is subject to call for 24 hours a day, will be respected by this Division in its enforcement policy.

MEETINGS, LECTURES, AND TRAINING PROGRAMS

I. *General*

15. If the following four criteria are met, the time spent in attending meetings and lectures need not be considered hours worked: (1) Attendance on the part of the employee is in fact voluntary (attendance will not be considered voluntary if a condition of the employee's continued employment in his present job is attendance at the meeting or lecture); (2) the employee does not produce any goods or perform any other productive work during such meeting or lecture; (3) the meeting or lecture is given outside of regular working hours; and (4) the meeting or lecture is not directly related to the employee's work. (With respect to this last criterion, a meeting or lecture will not generally be considered directly related to the employee's work unless such meeting or lecture may

[2] The question is obviously one of degree. No opinion is expressed in the case of the relief truck driver. As to the exemption provided by sec. 13 (b) (1) from the hours provision of the act, see Interpretative Bulletin No. 9.

reasonably be considered part of his job. Obviously, attendance at a picnic or to participate in an athletic contest would not be considered directly related to the employee's work. On the other hand, meetings and lectures for the purpose of teaching the employee mine rescue or fire prevention and control do seem directly related to the employee's work.)

II. *Specific situations*

The following is a discussion of the applicability of these general criteria to specific situations:

A. *Industrial Training Programs.*—With respect to industrial training programs, it is our opinion that time spent in attendance at industrial training courses need not be considered hours worked if (1) attendance on the part of the employee is in fact voluntary; (2) the employee does not produce any goods or perform any other productive work during such periods of training; (3) the training course is given outside of regular working hours; and (4) the training course is not intended to train the employee to a new, different, or additional skill, and is not intended to make the employee more efficient at doing what he has been doing in his present job. The last condition (4) is not a departure from the general criterion mentioned in the preceding paragraph that the meeting or lecture must not be directly related to the employee's work. Rather this condition is merely intended to indicate specifically how that criterion operates with respect to industrial training programs. In other words, in the case of industrial training programs, the programs will not be

considered directly related to the employee's work if the training course trains the employee to a new, different, or additional skill.

A few examples will serve to show the distinction between those industrial training programs attendance at which will be deemed hours worked and those programs attendance at which will *not* be deemed hours worked:

(1) One example is that of a welder who is working in an automobile plant welding steel automobile frames. The employer has accepted an order for airplane fuselages, in the construction of which employees having the skill to weld aluminum will be required. The employer gives to any welder in his organization the opportunity, if he chooses, to take a course after working hours in welding aluminum. In such course no finished product is made, but the end product of the welding is scrapped. There is provision that if the welder does not acquire this higher skill he shall be permitted to continue to be a welder working for the employer on steel automobile frames.

(2) Another example is that of a typist. An expansion of the plant gives opportunity for stenographers. The employer offers to any of his typists who choose an opportunity after work to be trained for stenographic work. Such training is not made a condition of their continuing as typists and no regular office work is done for the employer during the training period.

(3) Another example is the case of a punch-press operator who knows that his employer will install drop forging machines, employment in the operation of which will yield a higher rate of pay.

The employer offers a certain number of punch press operators and employees in other skills an opportunity after work to be trained on drop forging machines. The end product of the forging is scrapped. Punch-press operators who do not take this course are allowed to continue in employment as punch-press operators.

(4) Finally, an example of a case in which attendance at the training course must be considered hours worked is that of a sewing-machine operator in a garment factory whose productivity is such that it is marginal in comparison with the median productivity of all the other sewing machine operators. The employer says, "you are too slow and unless you practice on waste material after work and get up your productivity and speed, you cannot work here any more." This would be hours worked for two reasons: (1) Attendance would not be voluntary, and (2) the employee would not be learning a new, additional, or different skill.

These examples point out the underlying purpose of the four conditions which must be met if attendance at the training course is not to be considered hours worked. Such purpose is to prevent exploitation of labor in violation of the act by using alleged training programs to effect a stretch-out or speed-up in the work of employees in their present position. The program to satisfy the four criteria must essentially be for the purpose of providing better employment by adding skills primarily for the benefit of the employee, although, of course, the program would also benefit the employer by providing him with certain skills in which his labor market is deficient.

B. *Attendance at public schools, recognized universities or other bona fide institutions of learning.*—In some cases employees attend public schools or take regular courses in a recognized university or other bona fide institution of learning. The courses given are part of a standard curriculum and are not designed to accommodate the requirements of any particular plant. Thus, for example, a teller in a bank may take a university course on the financial policy of corporations, or a mechanic in a factory may take a course in draftsmanship or physics. In these cases the subject matter of the course impinges on the general subject matter of the employee's job and makes him more versatile and better qualified to assume additional responsibility. The instruction, however, has no necessary and immediate relation to the particular work done by the employee and he does not, of course, engage in any productive work for the employer during time spent taking the course. In our opinion, time spent by an employee outside regular working hours in attending lectures at, or in studying correspondence courses given by, a public school, or university, or other bona fide institution of learning (even if the employer pays the necessary tuition) will not be considered "directly related to the employee's work" and, if attendance is voluntary, need not be considered hours worked.

C. *Safety meetings.*—Safety meetings which take place outside working hours and are conducted, sponsored, or otherwise approved by a governmental agency (state or federal) or by any recognized independent or other bona fide organization engaged primarily in disseminating safety

information, will not be considered "directly related to the employee's work." Furthermore, even if the safety meeting is not so conducted, sponsored, or approved, it will not be considered "directly related to the employee's work" if it is conducted outside working hours as part of a general safety program which is not restricted to the hazards of the job at hand or to the personal responsibilities of employees in doing their job safely and efficiently. Accordingly, voluntary attendance at such meetings need not be considered hours worked.

III. *Apprenticeship training.*

In view of the special circumstances involved in bona fide apprenticeship training, it is our opinion that time spent in related supplemental instruction by a bona fide apprentice—one who is employed under a written apprenticeship agreement which meets the standards of the Federal Committee on Apprenticeships or which conforms substantially with such standards—need not be considered hours worked if the written apprenticeship agreement so provides. Bona fide apprenticeship programs involve consideration of public policy not present in the case of the ordinary employer-employee relationship. They are intended to provide the community with an adequate number of journeymen who have had a combination of practical experience and theoretical instruction and thus to enhance employability. The comprehensive program of practical training covering an entire trade is supplemented by theoretical instruction designed to give the apprentice a better understanding of the mechanical activities which he will be called upon to perform

in his trade. It should be noted, however, that related supplemental instruction does not include time spent by an apprentice in performing his regular duties or in any active work. Such time should be considered hours worked under all circumstances.

Employees Having More Than One Job

16. Many inquiries have been received with respect to employees who work for two or more companies. Thus, for example, company A and company B may arrange to employ a common watchman, the employee having the duty of watching the property of both companies concurrently for a specified number of hours each night. In this case A and B are not each required to pay the minimum rate required under the statute for all hours worked by the watchman (i. e., 30 cents an hour each) but A and B should be considered as a joint employer for purposes of the act.

17. In some cases, however, an employee may work 40 hours for company A and 15 additional hours during the same week on a different job for company B. In this case it would seem that if A and B are acting entirely independently of each other with respect to the employment of the particular employee, both A and B, in ascertaining their obligations under the act, would be privileged to disregard all work performed by the employee for the other company. If, on the other hand, the employment by A is not completely disassociated from the employment by B, the entire employment of the employee for both A and B should be considered as a whole for the purposes of the statute. Whether the employment by A

and B are completely disassociated depends, of course, upon the facts in the particular case. This Division will scrutinize all cases involving more than one employment and, at least in the following situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company.

B

LETTERS FROM ADMINISTRATOR

SOL: HK: MJPJ

OCTOBER 13, 1943.

Lt. Col. WILLIAM J. BRENNAN, Jr.,
Office of the Chief of Ordnance,
War Department, Washington 25, D. C.

DEAR COLONEL BRENNAN: This is in reply to your letter of October 1, 1943, to which were attached letters of September 21 and 28 from Sears, Roebuck and Company, contractor-operator of Lordstown Ordnance Depot, Warren, Ohio.

You state that the contractor has recently assumed operation of this storage and distribution depot which was formerly operated by the Ordnance Department with Civil Service personnel. Certain changes have been proposed as a result of this conversion which include the institution of a two-platoon system for fire fighters. The correspondence which you attached sets forth the following facts:

Each shift of fire fighters on the pay roll works a 24-hour tour of duty and is off duty 24 hours. Under this arrangement each shift is on duty three 24-hour periods in one workweek and four 24-hour periods the following workweek, which makes one short week and one long week in each two-week pay period. Prior to Sears, Roebuck and Company taking over the operation, junior fire fighters, senior fire fighters and one assistant chief were compensated on an annual salary basis. Union firemen were receiving $300 annually for overtime and senior fire fighters were being paid a $306 overtime allowance annually.

The company contends that where employees are engaged in active work only part of the day but because of the nature of the job, they are required to be on call for 24 hours, the Fair Labor Standards Act does not require overtime pay for all hours spent on the premises and the company refers to paragraph 7 of Interpretative Bulletin No. 13. The company has set up the following pay roll procedure worked out with the assistance of the fire chief, which it deems a proper determination of "hours worked" in accordance with paragraph 7 of Interpretative Bulletin No. 13:

	Hours
Tour of duty	24
	Hours
Less time allowed for sleeping	8
Less time allowed for breakfast	½
Less time allowed for lunch	½
Less time allowed for supper	¾
Less time allowed for personal needs	½
Total hours spent on post but off duty	10¼
Total hours actually on duty during each Twenty Four Hour Tour	13¾

The company request approval to consider 13¾ hours during a tour of duty as "hours worked" under the Fair Labor Standards Act.

The correspondence further shows that the employees in question will receive more total compensation for a biweekly pay period than they received as Civil Service employees for a semimonthly pay period. The company further explains their deduction of one-half hour from the 24-hour tour for "personal needs" and states that because the employees make their home on the premises during their tour of duty a certain amount of time must be allowed for shaving, toilet preparations, and bathing. It is pointed out that these personal needs are ordinarily taken care of before the employee reports for work and after he leaves work at night and that since they are performed on the premises while the employee is not working the company deducts 30 minutes for this purpose.

Sleeping and eating facilities are provided in the building which houses the fire fighting equipment. The fire fighters normally get eight hours sleep except in case of an alarm. Should a fire break out while the firemen are sleeping they are to be paid for the time spent answering the alarm, fighting the fire and putting away the equipment. A schedule attached to the company's letter of September 21 discloses that the employee's regular hourly rate of pay for the purposes of overtime compensation is computed on the basis of a 40-hour week (the weekly salary obtained by reducing the annual salary to its equivalent weekly wage is

divided by 40 hours and the result thus obtained is the regular hourly rate). Of course, in the case of an annual salary employee, insofar as the act's requirements are concerned, his regular rate of pay is computed by reducing the annual salary to its equivalent weekly wage and dividing the weekly salary by the number of hours regularly worked in that week, and if no regular number of hours are worked, by the actual number of hours worked in that week. In this connection see paragraphs 10–12, inclusive, in the enclosed copy of Interpretative Bulletin No. 4.

Under the proposed plan the company states that the firemen will be paid for time they are on active duty strictly in accordance with the requirements of the Fair Labor Standards Act and would be paid not less than time and one-half their regular hourly rate of pay for time on active duty in excess of 40 hours per week.

On the basis of the facts that are presented, I wish to advise you that the company's proposed methods of computing hours worked does not appear to be objectionable.

Very truly yours,

WM. R. MCCOMB,
Deputy Administrator.

Enclosure.

AD:JBM:GG
AUGUST 26, 1943.

Lt. Col. WM. J. BRENNAN, Jr.,
Chief, Labor Section, Office of the Chief of Ordnance, War Department, Room 1E-520, Pentagon Building, Washington, D. C.

Re: Silas Mason Company—Louisiana Ordnance Plant—Two-Platoon System for Firemen.

DEAR COLONEL BRENNAN: Consideration has been given to the request submitted by the Silas Mason Company, contractor-operator of the Louisiana Ordnance Plant, for permission to inaugurate a two-platoon system for firemen.

My understanding is that the firemen will be regarded as working for 16 of the 24 hours they are required to remain at the company's establishment, and for such time will be paid eight hours at straight time and eight hours at time and one-half. It is further understood that in the event they are called to active duty during the period reserved for sleep, they will be paid for the extra duty at one and one-half times their regular hourly rates of pay.

The plan is said to be mutually satisfactory to both employees and employer and appears to be unobjectionable. Payment to employees in accordance with the plan would not appear to be violative of the Fair Labor Standards Act.

Very truly yours,

WM. R. MCCOMB,
Deputy Administrator.

C

Statutory Provisions Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201) read as follows:

Sec. 3. As used in this Act—

* * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in

commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. [redacted] 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

JIM SKIDMORE, ET AL,
Petitioners

vs.

SWIFT AND COMPANY,
Respondent

MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIFE IN SUPPORT THEREOF

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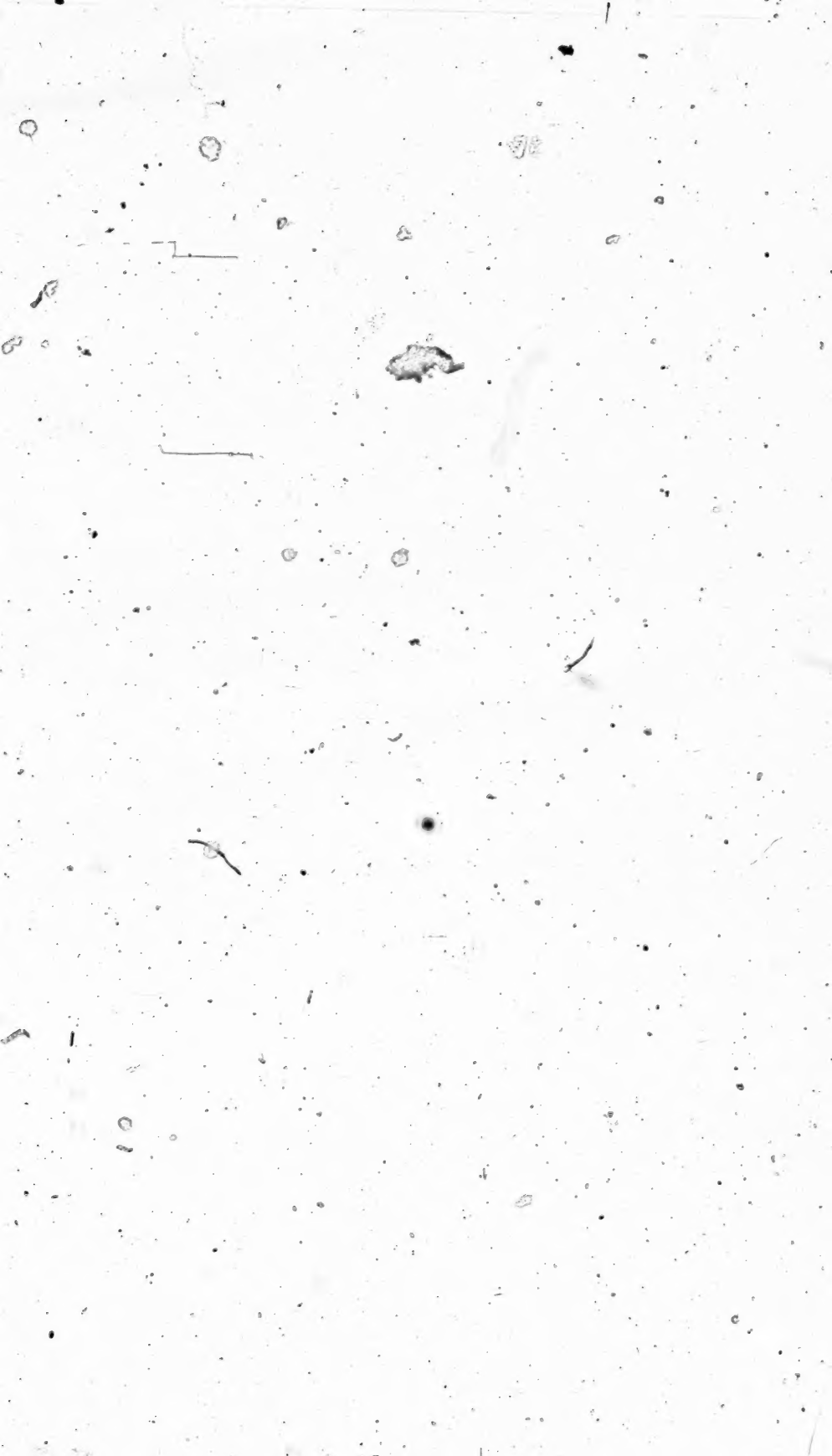

No. 218

IN THE

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OCTOBER TERM, 1943

JIM SKIDMORE, ET AL.,
Petitioners.

vs.

SWIFT AND COMPANY,
Respondent

MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice, and Honorable Associate Justices of the Supreme Court of the United States:

Now come the Petitioners, Jim Skidmore, W. W. Rousey, E. Phennell, H. Millican, R. Roark, Tom Dennis, and Ted Hayes, and move the Court to grant them a rehearing in this cause, and to set aside the order of denial of their petition for a writ of certiorari, and grant such petition, and for cause would respectfully show to the Court:

I.

The Court erred in denying the petition for a writ of of certiorari because the Circuit Court of Appeals for the Fifth Circuit had rendered a decision in this case on an important federal question in conflict with the applicable decisions of the Supreme Court of the United States.

II.

The Court erred in denying the petition for a writ of certiorari from the Circuit Court of Appeals for the Fifth Circuit because the decision of the Circuit Court involves the interpretation of a federal law which has not been, but should be, settled by the Supreme Court of the United States.

III.

Your Petitioners would further show the Court that if the judgment of the Circuit Court is permitted to stand that an important provision of the Fair Labor Standards Act of 1938 is nullified and voided even though the Supreme Court has held all sections of the said Act on which it has ruled to be constitutional.

IV.

Your Petitioners would show the Court that this Motion for Rehearing is filed within the 25 days from date of judgment as required by Rule 33 of the Supreme Court Rules.

Wherefore, your Petitioners respectfully pray this Honorable Court to grant them a rehearing and reconsideration, and respectfully pray that the brief printed with this Motion be filed, and that on further consideration the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

MACK TAYLOR,
711 Fort Worth National Bank Bldg.,
Fort Worth, Texas,
Attorney for Petitioners.

Of Counsel:
R. CURTIS McBROOM,
Fort Worth Club Bldg.,
and
FORBIS & LOVE,
Burk Burnett Bldg.,
Fort Worth, Texas.

Certificate of Counsel

I, the undersigned, Mack Taylor, attorney and solicitor for the above named Jim Skidmore, et al, Petitioners, do hereby certify that the foregoing petition for rehearing is presented and taken in good faith and not for the purpose of delay.

Mack Taylor

No. 218

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

JIM SKIDMORE, ET AL.,
Petitioners
vs.
SWIFT AND COMPANY,
Respondent

BRIEF IN SUPPORT OF MOTION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

I.

Previous Opinions

On October 11, 1943, this Honorable Court ordered that the petition for a writ of certiorari in the subject case be denied, but that Justice Black was of the opinion that certiorari should be granted.

The Circuit Court of Appeals for the Fifth Circuit Circuit rendered judgment on June 1st, 1943, for the Respondent. In its opinion the Circuit Court said, "The Act (*Fair Labor Standards Act of 1938*) does not require payment of wages to an employee merely because he is away from home. Nor does the Act undertake to regulate or restrict reasonable and bona fide

agreements whereby an employee agrees to be available if needed. * * * ." The full opinion of the Circuit Court is set out in the Transcript of the Record, pages 62, 63 and 64.

The District Court for the Northern District of Texas, Fort Worth Division, rendered its judgment August 1, 1942, and in its opinion said, "The time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked * * * ." The full opinion of the District Court is set out in the Transcript of the Record, pages 26 to 33.

II.

Brief Summary of Facts

The facts in this case are very simple:

Swift and Company in its packing house in Fort Worth, Texas, employed the seven Petitioners, which employment is admitted to be within the coverage of the Fair Labor Standards Act of 1938. These employees worked in the plant 5 days per week on a regular day-time shift of 8 to 9 hours, so that their day work totaled 44 and later 40 hours per week. This day-time work was consumed in operating elevators and keeping fire-fighting and fire-prevention equipment in good condition. For this day-time work these employees were paid a sum varying from $27 to $29 per week, with overtime pay for additional day-time work at rates of 68 cents per hour (as indicated by Schedule on pages 47 and 56 of Transcript of Record). In addition to this day-time work these employees were "required to remain in or within hailing distance of

the fire hall" 3 to 4½ nights at the plant to answer emergency alarms. (Tr. p. 37.) The employees did not live at the plant, but each "maintained a residence" of his own. (Tr. p. 37.) During these nights these employees had no specific duty except to answer—and at all times be ready to answer an alarm. They could while their hours away as they pleased so long as they stayed on the "job." A typical schedule of each of the plaintiffs is set forth in the Transcript, pages 39-40-41, as follows:

Cases of Jim Skidmore, W. W. Rousey, E. Phennell, R. Roark and Ted Hayes.

Period Oct. 24, 1938 to May 2, 1939 (44 Hour Law in effect)

	Hours
Typical schedule of hours of plaintiffs covering each day of a 7 day week	168
Monday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.—Operate elevator or general relief	8
Mid-day lunch period—Time off	½
3:30 P. M. to 5:30 P. M.—Supper (time off)	2
5:30 P. M. to Midnight—Fire Hall	6½
Tuesday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.—Operate elevator or general relief	8
Mid-day lunch period—Time off	½
3:30 P. M. to 5:30 P. M.—Fire Hall	2
Wednesday:	
5:30 P. M. Tuesday to 5:30 P. M. Wednesday—Time off	24
5:30 P. M. to Midnight—Fire Hall	6½

Thursday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.—Operate elevator or general relief	8
Mid-day lunch period—Time off	½
3:30 P. M. to 5:30 P. M.—Supper (time off)	2
5:30 P. M. to Midnight—Fire Hall	6½
Friday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.—Operate elevator or general relief	8
Mid-day lunch period—Time off	½
3:30 P. M. to 5:30 P. M.—Fire Hall	2
5:30 P. M. to Midnight—Time Off	6½
Saturday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 5:00 P. M.—Operate elevator or general relief	9½
Mid-day lunch period—Time off	½
5:00 P. M. to 5:30 P. M.—Fire Hall	½
Sunday:	
5:30 P. M. Saturday to 5:30 P. M. Sunday—Time off	24
5:30 P. M. to Midnight—Fire Hall	6½
	168

Thus these employees spent 102 hours per week in the employer's plant, as required by the employer, but were paid for only 40 to 44 hours, the maximum under the Fair Labor Standards Act.

All of the facts in this case were agreed and stipulated by the parties. (Tr. pp. 36 to 56.).

III.

Argument

Your Petitioners would first ask the Court to take judicial knowledge of the vast application of the question involved in this cause. There are but seven Petitioners, but there are many thousands of employees who are similarly situated, scattered in factories, oil fields, warehouses and in mines and out of the way places throughout the nation. By and large we believe employers have recognized that the Fair Labor Standards Act of 1938, commonly called "The Wage and Hour Law," applies to their employees while they are "on duty", but many of these employers have been looking for loop-holes and weakness in the Act. True, they may be forced by the present emergency and shortage of labor to abide by the strict meaning of the Act and pay the required overtime, but after the emergency the opinion in the "Swift Case" rendered by the Fifth Circuit will become a haven of refuge for all employers who want to keep their employees long hours without payment of overtime. Why should an employer give work to a nightwatchman, when he can simply put a cot in his office and say to one of his regular employees, "You sleep here tonight or I'll fire you," and never need think of paying him? In order to provide for his family, the employee will be forced to say, "Certainly I will sleep here tonight. My wife and children can get along without me." Thus one man is made to do two men's work, one of the things which Congress specifically intended to prevent in the Fair Labor Standards Act of 1938. For a large group of

employees, especially those living within the jurisdiction of the Fifth Circuit, the "Wage and Hour Law" will lose its meaning if this decision is permitted to stand by the Supreme Court.

The Administrator of the Wage and Hour Division filed an Amicus Curiae brief in this case on hearing before the Circuit Court of Appeals, and in discussing the work of the employees, said:

> "From the nature of this job it is apparent that the employees' freedom of action was necessarily restricted during the hours on call. Although each of the appellants maintained a home outside the premises (R. 37), the arrangements regarding fire hall duty precluded them from spending any of the time on call at home. The enforced waiting periods in or close by the fire hall were manifestly of benefit only to appellee. The Division has always taken the position that such waiting periods constitute hours worked for which compensation is due under the Act. A computation of hours worked which excluded all time spent on duty in appellee's fire house would not be accepted by the Division as a 'reasonable' determination."

This expression is borne out by the Interpretative Bulletins issued by the Administrator which were discussed in the original Petitioners' Brief in Support of a Writ of Certiorari.

Your Petitioners relied strongly in their petition on the expressions given by the Supreme Court in cases involving "hours worked or employed" under other Statutes. In *M. K. & T. Ry. Co. v. United States* (231 U. S. 112, 34 S. Ct. 26) and in *Bountiful Brick Co. v.*

Giles (270 U. S. 154) this Court indicated that an employee did not need to be engaged in physical labor to be "employed or working", but that being "on duty" or "present for duty" was more nearly the test of "employment". *Never* has the Supreme Court stated what constitutes "employment" or "hours worked" as those terms are used in the Fair Labor Standards Act of 1938. Surely, since this Act applies to a great sector of United States citizens, it is an important question of federal law on which this Court should rule.

A number of District Courts have found that the term "employ" as used in the Fair Labor Standards Act includes those hours which an employee is required by his employer to spend "on duty" even though not engaged in actual physical or mental labor. These cases —*Fleming v. Rex Oil and Gas Co.* (43 Fed. Sup. 950), *Travis v. Ray* (41 Fed. Sup. 6), *Walling v. Sun Publishing Co.* (47 F. Supp. 180), and *Walling v. Allied Messenger Service* (47 F. Sup. 773), all follow the clear meaning of the Act as relied on by your Petitioners. But the Circuit Court opinion in this case bears precedent over these District Court decisions and will rule, at least within the jurisdiction of the Fifth Circuit. Thus the law may become, and in fact is now, interpreted in one way in certain courts and in an opposite way in other courts, wherefore it becomes that uniformity can be gained only by a ruling of this Honorable Court.

Not only for the benefit of their own case do your Petitioners bring this plea for rehearing, but for the benefit of all those employees and employers who are involved in similar circumstances. Competition is keen

in the business world, and the employer who dares follow the Circuit Court opinion in this case, or who by virtue of living within the jurisdiction of the Fifth Circuit has a right to follow this opinion, will have a means of saving labor costs which his competitor in another jurisdiction would not dare practice.

Wherefore, your Petitioners pray the Court to grant this motion for rehearing and reconsideration, and to finally grant the Petition for a Writ of Certiorari.

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SUPREME COURT OF THE UNITED STATES.

No. 12.—October Term, 1944.

Jim Skidmore, et al., Petitioners, vs. Swift and Company. On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 4, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

Seven employees of the Swift and Company packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act to recover overtime, liquidated damages, and attorneys' fees, totalling approximately $77,000. The District Court rendered judgment denying this claim wholly, and the Circuit Court of Appeals for the Fifth Circuit affirmed.

It is not denied that the daytime employment of these persons was working time within the Act. Two were engaged in general fire hall duties and maintenance of fire-fighting equipment of the Swift plant. The others operated elevators or acted as relief men in fire duties. They worked from 7:00 a.m. to 3:30 p.m., with a half hour lunch period, five days a week. They were paid weekly salaries.

Under their oral agreement of employment, however, petitioners undertook to stay in the fire hall on the Company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason. No fires occurred during the period in issue, the alarms were rare, and the time required for their answer rarely exceeded an hour. For each alarm answered the employees were paid in addition to their fixed compensation an agreed amount, fifty cents at first, and later sixty-four cents. The Company provided a brick fire hall equipped with steam heat and air-conditioned rooms. It provided sleeping quarters, a pool table, a domino table, and a radio. The men used their time in sleep or amusement as they saw fit, except that they were required to stay in or close by the fire

hall and be ready to respond to alarms. It is stipulated that "they agreed to remain in the fire hall and stay in it or within hailing distance, subject to call, in event of fire or other casualty, but were not required to perform any specific tasks during these periods of time, except in answering alarms." The trial court found the evidentiary facts as stipulated; it made no findings of fact as such as to whether under the arrangement of the parties and the circumstances of this case, which in some respects differ from those of the *Armour* case, the fire hall duty or any part thereof constituted working time. It said, however, as a "conclusion of law" that "the time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts," and in its opinion observed: "of course we know pursuing such pleasurable occupations or performing such personal chores, does not constitute work." The Circuit Court of Appeals affirmed.

For reasons set forth in the *Armour* case decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not, and cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. *Walling v. Jacksonville Paper Company*, 317 U. S. 564, 572. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem

posed by the statute. But it does not differ in nature or in the standards to guide judgment from that which frequently confronts courts where they must find retrospectively the effect of contracts as to matters which the parties failed to anticipate or explicitly to provide for.

Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts. *Kirschbaum* v. *Walling*, 316 U. S. 517, 523. But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13.

The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call. Examples are an operator of a small telephone exchange where the switchboard is in her home and she ordinarily gets several hours of uninterrupted sleep each night; or a pumper of a stripper well or watchman of a lumber camp during the off season, who may be on duty twenty-four hours a day but ordinarily "has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for

relaxation and entirely private pursuits." Exclusion of all such hours the Administrator thinks may be justified. In general, the answer depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work." "Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer. . . ."

The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested, point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and those are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement

by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The courts in the *Armour* case weighed the evidence in the particular case in the light of the Administrator's rulings and reached a result consistent therewith. The evidence in this case in some respects, such as the understanding as to separate compensation for answering alarms, is different. Each case must stand on its own facts. But in this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous. Accordingly, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Reversed.